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A PRACTICAL TREATISE

OF

THE LAW OF

Ancient & Modern

WINDOW LIGHTS,

CONTAINING

I. *Light, how claimed.*
II. *User of Lights.*
III. *Obstructions to Lights.*
IV. *Extinguishment of Right to Lights.*

WITH

VARIOUS OTHER MATTERS RELATING TO THE SUBJECT.

BY HUMPHRY W. WOOLRYCH,
OF THE INNER TEMPLE, SERJEANT AT LAW.

Author of "The Law of Rights of Common," "The Law of Ways," "The Law of Waters and Sewers," &c.

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DEDICATION

TO THE FIRST EDITION.

TO

WILLIAM SELWYN, Esq.,

ONE OF HIS MAJESTY'S COUNSEL.

Dear Sir,

I intend this short Dedication of a Treatise on the Law of Ancient Lights merely as a testimony of the respect and esteem in which I hold your high and honourable character.

I cannot help saying, that whatever the fate of the little volume may be, it will at least gain some share of merit from the name with which it is adorned.

I am, dear Sir,

Very truly yours,

Humphry W. Woolrych.

Temple, July 8, 1833.

PREFACE

TO THE SECOND EDITION.

A Second Edition of this work is desirable, because a number of new decisions have occurred since the first was published. And not only is this the case; the subject itself, owing to the increase of building, is acquiring serious consideration. It is scarcely possible to anticipate the complications belonging to an interest in Ancient Lights. The statute 2 & 3 W. 4, c. 71, has by no means settled the subject. This edition is therefore submitted with some confidence to the profession.

H. W. WOOLRYCH.

2, *Hare Court, Temple, June* 8, 1864.

PREFACE

TO THE FIRST EDITION.

This little Treatise embraces as much as the Author has been able to collect upon the popular and by no means uninteresting subject of Window Lights. The various obstructions which are occasionally offered to this privilege of light are fully treated of, and this consideration naturally involves the right to the easement itself. The mode of using windows (a point which raises the question of alterations), is also distinctly treated of.

Lastly, there are acts which work an extinguishment of the privilege altogether; and there are some which, it has been fruitlessly contended, have caused such a destruction of

the right. These have also been mentioned, with many other matters (not omitting the late statute concerning prescription) which belong to the subject under examination.

Temple, July, 1833.

TABLE OF CASES.

THE LAW

OF

ANCIENT AND MODERN

WINDOW LIGHTS.

CHAPTER I.

Light, how Claimed.

The elements of light are incorporeal hereditaments as long as a man holds possession of them. They are usufructuary properties, the subject of each man's occupation who avails himself of them; at first, indeed, remaining unavoidably in common, but capable of being converted to a temporary or perpetual use, according to the pleasure of individuals.

"Light and air are bestowed by Providence "for the common benefit of men, and as long "as the reasonable user by one man of that "common property does not do actual and per-

"ceptible damage to the right of another to "the similar use of it, no action will lie" (1).

The lights, however, which are considered valuable by our law, are such as are enjoyed for domestic purposes, for the carrying on of trade, and for the general convenience of the dwelling. Their worth lies in utility, as opposed to luxury; for whilst a remedy is freely offered against an interruption of windows which confer comfort upon the house, a fine prospect may be obstructed, and an excess of light may be diminished. But the lapse of time is necessary to give that sanction to these easements which will secure for their owner a right of action against intruders. And this rule could hardly be said, in its origin, to have worked injustice; for it was a man's own fault, in the country, to build so near to the extremity of his land as to endanger his lights, by risking the event of some erection on the adjoining land; and, on the other hand, in towns, it had been to the injury of commerce to have favoured too much the privilege of light amongst neighbours, since the more populous the dwellings, the more thriving the com-

(1) In *Embrey* v. *Owen*, 20 L. J., Ex., 217; 6 Ex. 353; 15 Jur. 633.

munity. After a time, however, when property came to be more settled, and few rights remained unappropriated, it became necessary to hold, that men should be protected in the enjoyment of their rights. And hence, if it could be shown that an easement of light had existed immemorially in a house, the Courts would not permit the right to be disturbed; but, as years rolled on, and privileges of every sort became of greater importance, it was considered, on the one hand, that if persons were so indifferent as to allow their neighbours to use lights for twenty years without objection, the continuance of the windows could hardly be prejudicial; and, on the other hand, that it was inconsistent with justice to compel people to forego an enjoyment which they had used without hindrance for twenty, thirty, or forty years; so that it was at length resolved, that an adverse possession of light for twenty years would establish a *primâ facie* title in favour of the owner. So that a window which had existed for twenty years became a valuable appurtenance to the house; and the light and air derived from that source were, consequently, as was said in the commencement, the subjects of beneficial occupation. Adopting this measure of limita-

tion, the statute 2 & 3 W. 4, c. 71, has fixed the term of twenty years as the period at which the right to lights may be claimed, absolutely and indefeasibly, if enjoyed during that time without interruption.

Under some circumstances, also, which will be explained by-and-by, a much less enjoyment than for twenty years will confer a right of action.

The divisions of our subject will be:—

First, How this easement, light, may be claimed.

Secondly, How it may be lawfully used.

Thirdly, What shall be said to be obstructions, and what not, together with the legal remedies for interrupting the light. And—

Fourthly, What shall be called an extinguishment of the privilege of lights.

But, before we enter upon the modern statute, which changes the ancient mode of prescribing for the privilege, and which also abolishes the doctrine of presumption, it may not be amiss to give an account of the old law upon the subject, and to lay before the reader the decisions which governed the ancient claims, before the alteration.

As to the former mode of making title to

ancient or other lights, they were most usually claimed by prescription or grant; but a good title might have been made to them by mere occupancy and acquiescence, for twenty years, or perhaps less; for every man might erect, even on the extremity of his land, buildings with as many windows as he pleased. Requiring no consent for the purpose from the owner of the adjoining land, he began to gain a right to the enjoyment of the easement by mere occupancy (1).

First, by prescription. It may be remarked here, that the modern indulgences afforded by the judges to an enjoyment of lights for twenty years precluded, in many instances, the necessity of prescribing for them. But as such an enjoyment was merely *primâ facie* evidence, liable to be rebutted and destroyed by proof of a want of title (2), or, upon some occasions, through the incompetency of the party suing, to avail himself of a presumed grant (3), those who could establish an immemorial right of this nature did not hesitate to avail themselves of it, either by exhibiting it on the record as a plea

(1) 3 B. & C. 340, *per* Littledale, J.

(2) See 2 Wms. Saund. 175 (*b*), Gould, J.

(3) See 4 B. & Ald. 579, *Barker* v. *Richardson.*

to an action of trespass, or bringing it forward in support of their declaration, in an action upon the case. We shall, therefore, give a few instances of prescriptions of this kind, in order to illustrate the point before us. But it may be proper to observe here, that the objections to actions on the case, for want of a prescriptive statement, which had been so frequently advanced with success, were no longer countenanced, even before the new Act. Consequently, when we find instances, on the one hand, of prescriptions which have been deemed invalid because their immemoriality was not mentioned in the declaration, and other numerous examples, on the other, of an ample mention of the respective customs time out of mind, it may be understood, as far as the first are concerned, that such difficulties could now be repelled, and, with regard to the latter, that the lengthened description of the ancient right may now be spared (1).

And in a plea the severe strictness of former

(1) This observation applies to other incorporeal hereditaments, as ways, commons, water-courses, tolls, &c. *Rider* v. *Smith*, 3 T. R. 766, is a leading authority upon the subject.

The Courts, however, inclined to disallow this

times was not allowed to prevail, even before the new Act, which, as we shall see by-and-by, makes it sufficient to state the enjoyment to be *as of* right, without pleading the *que estate*. For where a defendant very recently justified in trespass, alleging that because certain boards were obstructing his ancient window he removed them, whereas it appeared that this window was not of an earlier date than 1807, Tindal, C. J., held, that the substance of the plea was proved; observing, that the question was not whether the window were strictly ancient, but whether it were one which the law, in its indulgence to rights, would call such in modern times (1).

One Bland prescribed in an action on the

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objection at a much earlier period; Comb. 481, *Roswell* v. *Prior*, where it was held, that although the omission of *antiquum messuagium* might have been fatal on demurrer, it was helped after verdict; Carth. 454; 1 Salk. 459. But Rokeby, J., thought that the declaration would have been good even upon demurrer; 1 Lord Raym. 392; 6 Mod. 116; 12 Mod. 215. And, indeed, the objection had been actually taken on demurrer nine years before, and failed; 1 Show. 7, *Villers* v. *Ball*.

(1) Moo. & Malk. 400, *Penwarden* v. *Ching*, at Exeter Summer Ass. 1829.

case against Moseley, declaring his seisin in fee of an ancient house in York city; and that he, and all those whose estate, &c., from time whereof, &c., had been used to have for them and their tenants for life, years, and at will, seven windows or lights, &c., by force of which windows he and all those, &c., had been used to have divers wholesome and necessary easements and commodities, by reason of the open air and light. He then stated the obstruction occasioned by the defendant. The defendant, in answer, pleaded a custom in York to build up against windows which might, at any time, overlook the adjoining land (1); and then he justified the stoppage of the plaintiff's light under the custom. The plaintiff demurred, and judgment was given for him by the whole Court; for, first, the defendant could not successfully set up one custom against another; as, if one had a way over A.'s land by prescription, A. could not claim to stop that way by custom; secondly, it might be that the owner of the land where the nuisance was created had granted to the owner of the house

(1) But it must be understood that this custom applied to houses *on new foundations*, where there was not any building before. See Yelv. 216.

to have the windows without obstruction, and thus the prescription would have had a lawful beginning (1). So, again, the plaintiff prescribed, in an action on the case, to have a light which his house had immemorially received, and of which house he was seised in fee. He further said, that one H. was seised in fee of the land adjoining, and that, having erected a shed upon his land, so as to stop the plaintiff's light, he, H., had demised for years to the defendant. The defendant urged, that as no request had been made to him to remove the shed, the action could not be maintained, because he, as lessee, had done nothing, but merely continued the premises as he found them; and the Court seemed disposed to allow his objection (2); but the lord chief justice held it clear that the plaintiff might have had an assise of nuisance against the lessor (3). In

(1) 9 Rep. 58, *Bland* v. *Moseley*, cited there; S. C., cited Hutt. 136, by mistake; S. C., cited Yelv. 216, as *Moseley* v. *Ball*; S. C., *semble*, cited as *Althan's* case, Godb. 183. See Freem. 210; 1 Ro. Ab. 566; 1 Com. Rep. 74, n. (1).

(2) The plaintiff, it seems, procured judgment to be entered for him, and the defendant was put to his writ of error; Cro. Jac. 373.

(3) 1 Ro. Rep. 221, *Rippon* v. *Bowles;* Cro. Jac. 373; and it was so adjudged many years afterwards, as we

this last case Houghton, J., observed, that if one have a way over another's land, and if then the way be stopped by the owner of the land, who grants a lease for years, an action on the case will lie against the lessee for a continuance of the nuisance (1). And the distinction is obvious; because it is hardly possible but that the lessee must, in some way or other, contribute to the obstruction complained of, as by refusing the alleged right of passage, &c. If, however, the lessee were to be entirely passive, it might be difficult to distinguish the case of ways from that of lights. These cases have been cited as examples of prescriptions; and it therefore appears to have been sufficient to have alleged that light had entered time out of mind through the obstructed windows, whereby the plaintiff had been injured in the enjoyment of his dwelling (2). And now, under the pro-

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shall see by-and-by; 1 Lord Raym. 713, *Rozewell* v. *Prior*. See *post*.

(1) 1 Ro. Rep. 222.

(2) See 1 Ventr. 248, Anon.; Poph. 170, citing 7 E. 3, 50; in which last case the immemoriality of the right was not sufficiently pointed out; 9 Rep. 54; 2 Show. 96, —— v. *Fetherston*, where it was held sufficient in pleading to say a certain messuage *or* tenement; although it was admitted that such a mode would be

visions of the statute, the person claiming the light, whether plaintiff or defendant, need only state the disturbance of his enjoyment in the usual manner.

Referring here, for a moment, to the case of *Bland* v. *Moseley*, and to the unsuccessful defence of setting up one custom against another which was attempted there, it may be added, that it is not the solitary instance of such an effort to defeat an action for obstructing ancient lights.

Custom of London.

This seems to be the proper place for the mention of a very weighty custom, which has been frequently relied on for that purpose, although now, in a great measure, if not entirely, abrogated by the statute of prescription (1); namely, the custom of the city of London, which allowed the building up on old foundations, in certain cases, although the adjoining windows should be thereby darkened. The custom above alluded to, in the city of York, extended to the raising of new buildings where none existed before, to the disparagement

bad in ejectment, because the sheriff would not know of what to give possession.

(1) 2 & 3 W. 4, c. 71. See *post.*

even of *ancient* lights, which was too erroneous an usage to be countenanced, for it could not be reconciled with any reasonable commencement. But the custom of London was confined within much narrower limits, and appears to have been as follows: "It is warrantable, by the "custom of London, to rebuild any house upon "the old foundation, where the ancient house "stood, in height at pleasure of the party, "although, by rebuilding, the lights of his "neighbour be stopped up, unless there be some "writings to the contrary" (1).

So that, as the privilege would not embrace any other than ancient houses, these must be necessarily of considerable antiquity, and consequently the right insisted upon cannot be considered as inconveniently extensive. The Court, upon one occasion, although they gave judgment against the defendant upon the issue immediately before them, yet held the custom reasonable. They said, that it might arise on a lawful commencement or reason in cities or boroughs; for example, a tradesman might have settled himself in a commodious part of

(1) Privilegia Londini, p. 101, cited Moo. & Malk. 351; and see also Godb. 183; Yelv. 215; 1 Burr. 250.

the city, where, through the increase of his trade, his house might have become (to use the words of the report) too small for his company, and then the custom would allow him to build higher, for his better habitation, because the tendency of the privilege would be to people cities, and to encourage tradesmen in such places (1).

However, when no such protection or invitation to settle was expedient, the judges did not lean towards the establishment of such a custom, although, if it corresponded with the circumstances of the case, they did not refuse to take notice of it. And it is worthy of remark, before we cite the decisions upon the subject, that the defence of the custom of London upon these occasions is an exception to the well-known rule, that one custom cannot be pleaded and set up against another; because, when the recorder comes into court and certifies a custom of the city, the usage must be recognised after the filing of the *certiorari* and return; and the privilege of building upon old foundations, concerning which we now speak, has received that sanction (2).

(1) Yelv. 216.

(2) See 1 Burr. 248, *Plummer* v. *Bentham*.

One of the earliest cases upon the custom was, where the plaintiff declared upon his possession of ancient lights, and alleged, that the defendant was the owner of an adjoining house; that he had built a house upon a yard contiguous, which also belonged to him, and thus that the ancient windows had been obstructed. The defendant pleaded the custom of London, and the Court declared their approbation of it, but gave judgment against the defendant because he was charged with building on the yard, the void piece of ground, which had no relation to the old foundations mentioned by the custom; and, therefore, he had not answered the plaintiff's allegations (1). So, again, the plaintiff declared for stopping three of his lights by a building in the defendant's yard, and the custom of London was set up as a defence. Here, however, the defendant failed in his plea, for the plaintiff had charged him with stopping all the lights and air, whereas the defendant had only justified in respect of two

(1) Yelv. 215, *Hughes* v. *Keme;* Godb. 183, *nom. Hughes and Keene's* case, differently reported; 1 Bulstr. 115, *nom. Hughes* v. *Keymish,* citing *Hammond* v. *Alsey,* Pasch. 34, Eliz., that a man may build upon a new foundation.

of the windows and *part* of the third : he ought to have pleaded not guilty to part, to have shown in certain what part, and then to have justified for the residue. So the plaintiff recovered by the opinion of the whole Court (1).

Upon a similar occasion of obstructing windows, the recorder came into court and certified the custom *ore tenus ;* and thus it was : " That " if any one hath a messuage or house in the " said city, near, or contiguous and adjoining, " to another *ancient* messuage or house, or to " the *ancient* foundation of another ancient " messuage or house, in the said city, of another " person his neighbour there, and the windows " or lights of such messuage or house are " looking, fronting, or situate towards, upon, or " over, or against the said other *ancient* mes- " suage or house, or *ancient* foundation of such " other ancient messuage or house of such " other person his neighbour, so being near, " adjacent, contiguous, or adjoining, although " such messuage or house, and the lights and " windows thereof, be or were ancient, yet such " other person his neighbour, being the owner " of such other messuage or house, or *ancient*

(1) Yelv. 225, *Newhall* v. *Barnard ;* 1 Bulstr. 116.

"foundations, so being near, adjacent, or ad-
"joining, by and according to the custom of
"the said city, in the same city, for all the time
"aforesaid used and approved, well and lawfully
"may, might, and hath used, at his will and
"pleasure, his said other messuage or house, so
"being near, adjacent, or adjoining, by build-
"ing, to exalt or erect, or, if new, upon the
"*ancient* foundations of such other messuage
"or house, so being near, adjacent, or adjoining,
"to build and erect a new messuage or house,
"to such height as the said owner shall please,
"against and opposite to the said lights and
"windows near or contiguous to such other
"messuage or house, and, by means thereof, to
"obscure and darken such windows or lights,
"unless there be, or hath been, some writing,
"instrument, or record of an agreement, or
"restriction to the contrary thereof, in that
"behalf."

But it was certified, at the same time, that there was no custom to erect any building, thus confining the privilege to the raising of messuages or houses.

The Court, after hearing the recorder, ordered the *certiorari* to be filed, and the return recorded; but the reporter does not mention the

result of the case (1). We may conclude, however, that the custom prevailed, the defendant having shown that his house stood, at all events, upon an ancient foundation; and it had been successful in a case in the early part of the reign of Geo. 1, where King, C. J., allowed it to be given in evidence under the general issue (2).

The custom came again under consideration. An action was brought by the heir of a surviving trustee, for an injury to the reversion of a house in Wood Street, by obstructing an ancient window. The defendant occupied the two adjoining houses. He had a skylight placed over an area, into which the window looked. This skylight had existed for some years, but below the window; and now the defendant, having raised it, caused the obstruction complained of. It was shown that the ancient window had been twice blocked up between the year 1792 and the time of the action (1829); once, by means of boards, for seven years; and afterwards, with bricks, for

(1) 1 Burr. 248, *Plummer* v. *Bentham*.

(2) Com. Rep. 273, *Anon; Winstanley* v. *Lee*, 2 Sw. 333, *post*.

fourteen or sixteen months. These acts were done by the orders of an under-lessee, without the knowledge of the reversioner. The sky-light rested, on one side, on the foundation of an old wall which had divided the back-yards of the defendant's houses; but it appeared that *two of the walls only* forming the area belonged to the defendant. The defendant, however, relied upon the custom of London before mentioned; but Lord Tenterden said, that the defendant ought to have proved an ownership of all four walls in order to avail himself of the usage, and upon this a verdict passed for the plaintiff. His lordship also inclined to hold, that proof ought to be brought forward, upon such occasion, that the walls enhanced upon are as ancient as the lights obstructed (1). His lordship, moreover, declined to give any

(1) Upon this the reporter observes, that the "question might become very material in cases where "both the window and foundation were older than "living memory, as the verdict would pass, in almost "all such cases, for the party who was not obliged to "produce the evidence." And again, "The number of "instances in which defendants have successfully "relied on the custom would seem to furnish con-"siderable evidence that no such proof has hitherto "been required from them." M. & M. 352, note b.

opinion as to the mode which had been adopted to bring the custom before him (1).

Yet the ancient custom was not abandoned without a struggle. The custom was pleaded in case, upon which the replication stated the enjoyment for twenty years. In support of the demurrer to the replication, Sir W. Follett, S. G., said, that the Act did not interfere with any right, but merely facilitated the proof of it. But as the words, "any local usage, &c., "to the contrary notwithstanding," occur in the section relating to windows alone, the custom must have been in the view of the legislature (2). This decision did not give satisfaction, and it was questioned in error from the Court of

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Indeed, it seems to have been understood, from the beginning, that the custom of London, being in furtherance of trade, should prevail against a prescription of this nature, however ancient.

(1) Moo. & Malk. 350, *Shadwell* v. *Hutchinson;* 3 C. & P. 617. The counsel for the defendant had read a short statement of it from the "Privilegia "Londini," observing, that as it had been certified by the recorder, more than once, the Court would take notice of it without proof. See the statute 2 & 3 W. 4, c. 71, *post*, superseding the custom of London in this respect.

(2) *Salters' Comp.* v. *Jay*, 5 Q. B. 111; 2 Gale, D. 414; 6 Jur. 803.

Exchequer, but the Court were quite clear against the custom (1).

Before we take leave of the subject of prescription, it should be added here, that the right thus claimed is in respect of the *house*, and not of the person; wherefore, as we shall see hereafter, lessees for years, reversioners, and others who are not seised in fee in possession, might sue for their lights, because there needed not to be a prescription in any *person*, inasmuch as the allegation of immemorial enjoyment was confined to the house (2); so that if a plaintiff were to have declared in a *que estate*, being a mere lessee for years, his declaration would have been bad upon demurrer (3).

Secondly, this easement of light might have been claimed by grant; and if the right arose, in such cases, by virtue of express concessions only, whether by deed or parol, any further mention of it might be safely neglected. Some

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(1) *Merchant Taylors' Comp.* v. *Truscott*, 11 Ex. 855; 25 L. J., Ex., 173; 2 Jur. (N. S.) 356.

See, as to the power of the Court of Aldermen over lights, under 19 Car. 2, c. 3, now obsolete, 2 Salk. 425, *Arnott* v. *Brown*.

(2) Cro. Car. 326.

(3) See 1 Lord Raym. 226.

litigation, it is true, might occasionally take place, in order to gain the due exposition of a covenant; but still the decision would be mainly governed by the manifest and obvious intention of the grantor. The law, however, acting upon principles of equity, not unfrequently presumed a grant where no such permission expressly appeared; and hence a variety of questions and difficulties have come before the consideration of the Courts, which the late Act may, in some measure, avert for the future. For the circumstances under which these implied grants have been recognised by no means range themselves under one head: sometimes a title was made to lights immediately from the landlord of the house in which they are enjoyed; sometimes it was contended, and often successfully, that the landlord or owner of the adjoining dwelling had impliedly yielded the licence relied on. And this latter permission, which was formerly classed under the head of implied grants, seemed afterwards to be deemed rather a covenant by implication. For, speaking with legal strictness, an easement of light can hardly be said to be granted except upon the soil where it is enjoyed; because light and air are not used in the land of another, as rights of

common and of way may be (1). And the right to insist upon the non-obstruction and non-interruption of light more properly arises by a covenant which the law will imply not to create such hindrance to the enjoyment of that easement (2). Therefore, by adopting this rule, we could not treat of grants, *eo nomine*, excepting as between landlord and tenant, assignor and assignee, vendor and vendee, &c.; cases in which the right to the windows arises on the land where they are situate, and where it passes under the ordinary words used in conveyances, as lights, ways, water-courses, &c.

The title to the easement, when claimed by virtue of the implied conditions above mentioned, seems to have rested upon occupancy and acquiescence; occupancy by the party enjoying it, and acquiescence for twenty years on the part of the adjoining land-owner.

There was a class of implied grants, before the new statute, or, more properly, implied covenants, which must not be omitted (3).

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(1) With respect to other differences between rights of way, common, &c., and lights, see Hob. 131; 3 Mod. 48; 11 East, 374; 2 B. & C. 690; 3 B. & C. 340.

(2) 3 B. & C. 340, *per* Littledale, J.

(3) We have retained the term "implied grants"

These were presumed by the law under the following circumstances :—If windows were opened opposite or contiguous to the premises of another, it is well known that the proper course was to build up against such new lights, if they were annoyances ; but should the lights have remained thus opened and unobstructed for twenty years, they acquired *primâ facie* a privilege and protection, and an action lay for darkening them (1) ; for, by reason of so long an acquiescence by the opposite or neighbouring inhabitant or owner, he was supposed by law to have assented to the alteration, or, in other words, a grant by him was presumed (2). So that if an action on the case were prosecuted for an injury to such lights, or if the owner of the lights abated the nuisance erected against them, the plaintiff in general was held entitled to recover on the one hand, and the defendant justified in removing the obstruction under which he suffered on the other.

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here, because in the cases which will immediately follow the presumptions were considered in that light, and not as of implied covenants arising from occupancy and acquiescence according to the modern doctrine.

(1) 4 Esp. 69, *Cotterell* v. *Griffiths.*

(2) See 2 B. & C. 689, Bayley, J.

A point, however, of considerable importance arose out of the consideration of the latter class of implied grants, or covenants. For it is an established rule, that, where such a license is relied upon, it must appear to have been conceded by one who was at the time in a situation to confer the privilege. So that if it were to turn out that the landlord, or owner of the inheritance, had not assented to the opening of the new windows, or if the occupier, by reason of his particular tenure, a rector for instance, were to be held incompetent to make the supposed grant, the case on the part of the plaintiff necessarily failed, unless he could prove a prescription against the defendant; and hence the value of showing the easement to be immemorial was clearly evinced. The following cases will illustrate the foregoing doctrine. The plaintiff sued the defendant for having wrongfully built a high wall, so as to occasion an obstruction of the description we have been alluding to. The premises of the plaintiff adjoined those of the defendant, and in 1787 the windows in question were opened towards the defendant's property. These lights were at that time unobstructed, because the opposite building was a low bakehouse, tenanted by one A. until within three

years previously to the action (1). Sir G. W. was the landlord, and the present defendant claimed under him. The defendant had built the erection complained of about two years since upon the site of the old bakehouse, and having raised this new wall much higher than the old premises, the plaintiff's windows were considerably darkened. It further appeared, that the plaintiff would not have received any great inconvenience had he not made the alterations to vindicate which he had embarked in the present suit. It was urged that the defendant stood in the place of his landlord, his reversioner, who could not be bound by the acquiescence of his tenant for twenty years; but the objection was overruled. The point was again pressed upon a motion for a new trial, and the counsel against the rule feeling the difficulty, remarked, that as Sir G. W.'s steward resided in the town where the dwelling-house of the plaintiff was situate, he must have seen the windows in his constant walks. But the Court answered, that the point of acquiescence was not presented to the jury; that there was no evidence in the report to warrant any presump-

(1) Which was brought in 1809—1787—22 years.

tion of knowledge on the landlord's part, and, therefore, that the foundation of the plaintiff's claim had failed, because the ground of that would be the exercise of an adverse right against the party capable of making the grant, who was, in this case, Sir G. W. the reversioner. The rule was accordingly made absolute (1).

In the next case it appeared that the obstruction complained of by the plaintiff had been erected upon glebe land belonging to a rectory, and conveyed in exchange by the rector, with the consent of the bishop and patron, to a purchaser under 53 G. 3, c. 147, who had conveyed it to the defendants. The conveyance first mentioned was within six years before the suit, and the plaintiff's window had existed without interruption for more than twenty years. It was objected that the rector was a mere tenant for life; that he could not, therefore, make such a grant as would sustain the plaintiff's pretensions; and that length of time could not operate against one who was not the owner of the inheritance. But Dallas, C. J., directed a verdict for the plaintiff, with liberty to move to enter a nonsuit; and the rule ob-

(1) 11 East, 372, *Daniel* v. *North*.

tained for this purpose was made absolute. It is in vain to urge, said Abbott, C. J., that the house in question should have been presumed ancient, or built on an ancient site, or that the window had been there before the adjoining land had been granted to the church; for there was no evidence at the trial from whence the jury could presume any such facts. The purchasers, therefore, having bought all the rights belonging to the land at the time of sale, the plaintiff must necessarily submit to have a nonsuit entered (1).

It is observable that in the former of these two cases the origin of the plaintiff's right to the windows was ascertained, but not so in the latter. We mention this because in the case about to be cited the presumption of a grant was allowed, the windows in question having been well known for thirty-eight years, and their beginning not having been traced. It will be asked, therefore, why a grant should be implied from hence with more truth than in *Barker* v. *Richardson;* to which it may be readily answered, that the rector could not by

(1) 4 B. & A. 579, *Barker* v. *Richardson and another*. See 2 Wms. Saund. 175, d., *Bradbury* v. *Grinsell*.

possibility bind his successor; and to have presumed that the plaintiff's lights were more ancient than the rectory, would have been unreasonable. The principle adhered to, however, in the case beneath was, that every fair and sensible presumption should be entertained in favour of ancient lights; and that as the owner, although he might not have been cognizant of the state of the windows, was in a condition to assent, his license should be presumed, there being no evidence as to the commencement of the easement. An action upon the case was brought for obstructing the plaintiff's ancient windows by means of a wall. Some of the witnesses represented that they had known the windows for thirty-eight years, but the origin of the lights was not fixed. The defendant had been the purchaser of the premises adjoining the plaintiff's house about three years before the action. These premises belonged, before the sale, to a family, no member of which, as it seemed, had ever seen them. They had been, for twenty years before the sale spoken of, in the hands of the same tenant. It was submitted, first, that as the plaintiff's windows were not at the extremity of her land, the presumption of a grant did not arise; and, secondly,

that the doctrine of presumption would not apply, for want of knowledge, on the part of the owner of the premises sold to the defendant, that the plaintiff's windows were in existence. Holroyd, J., however, treated them as ancient lights, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. The rule, being applied for, was refused. First, the position of the windows, whether at the extremity of the plaintiff's land or not, was not material, nor would it in any degree vary the rights of the parties. Secondly, had the plaintiff's easement commenced during the tenancy of twenty years, the defendant's objection might have prevailed; or, had the evidence of that tenancy gone back as far as the existence of the windows, it would have been material to have inquired whether they had or not the appearance of ancient lights at that time; but here they could not be taken otherwise than as ancient lights, unless some evidence had been offered to contradict that fact, and, consequently, the plaintiff was entitled to recover (1).

(1) 2 B. & C. 686, *Cross* v. *Lewis* See the judgment of Littledale, J., 3 B. & C. 339, as applicable to all these cases.

Thirdly, a title to light might have arisen by occupancy and acquiescence for twenty years, or less, perhaps, under the particular circumstances of the case. As where a lodger occupied the first and second floors of a house. He had thereby a right to the skylight of the staircase, and case lay for obstruction (1).

Originally, indeed, such easements could hardly be considered as commencing in any other way than by occupancy; but as the claims to the use of windows used to be made most frequently in respect of some prescription or grant, we have mentioned the latter in the first instance, according to the law which prevailed before the 2 W. 3, c. 71, to which we shall immediately advert.

And here it is observable, that although the presumption of an implied grant prevailed after an user of light acquiesced in for twenty years, yet, by applying the doctrine of occupancy and acquiescence to those cases, the result was the same. Consequently, the decisions lately cited show, first, that if a party assented to the enjoyment of windows put out from a neigh-

(1) *Underwood* v. *Burrows*, 7 C. & P. 26. The lodger has a right to the door-bell, the knocker, the skylight, and the water-closet.

bouring house, during a period of twenty years, by offering no interruption to them, he was considered, not as having impliedly conferred a grant prior to the commencement of the user, but as having tacitly entered into an agreement or covenant that, after so long an enjoyment, neither he, nor those claiming under him, would molest the free advantage of a right which owed its birth to mere occupancy; and, secondly, that the person thus submitting silently to this condition must have been proved to have been cognizant of the enjoyment so substantiated by lapse of time, or, being cognizant, that he was so circumstanced as to have been able to yield the acquiescence required by law; and it is not unworthy of remark, that where the adjoining premises were on lease, the period of adverse possession for twenty years could not be otherwise reckoned than from the time when the reversioner became acquainted with the existence of the lights; a question, it seems, peculiarly for the attention of the jury.

We have thus shewn, that, according to the old law, the privilege of light could be claimed by prescription, by grants, either express or implied, and by occupancy. Now, however, the new statute of prescription has interfered,

conferring at once an absolute right after twenty years, and abolishing all presumptions of grants within that period. For in those cases where it has been held, that the grantor of an estate cannot derogate from his own conveyance, the law will rather imply a covenant than a grant. It is enacted by the third section of 2 & 3 W. 4, c. 71, that when the access and use of light, to and for any dwelling-house, workshop, or other building, shall have been enjoyed therewith for the full period of twenty years, without interruption, the right thereof shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

This third section is retrospective; therefore, where windows were enjoyed in 1815, the easement had accrued (1).

By section 4,—The periods are to be deemed to be those next before suits for claims are brought, and nothing shall be said to be an interruption unless submitted to for one year after the party interrupted shall have had

(1) *Simper* v. *Foley*, 2 Johns & H. 555.

or shall have notice thereof, and of the person causing the interruption.

The words "any suit or action" are worthy of notice. If an occupier enjoy light for the full period of twenty years, and after that period if an action be brought, and again, subsequently, if another action be instituted concerning the same premises, the period of twenty years will count as from the first action. The term of twenty years is indefeasible. Therefore, upon demurrer to a replication setting out an action in Chancery, and another in the Common Pleas, prior to both of which the time had run out, the Court refused to limit the title under sections 3 and 4, to the *pending* suit, but referred it to *any* suit, so that judgment passed for the plaintiff (1). The third section, said Mr. Justice Coleridge, "seems to me to simplify and almost "new erect the right to light and the mode "of acquiring the access of it. It founds it on "actual enjoyment for the full period of twenty "years without interruption, unless that enjoy-"ment is shewn to have been by consent or

(1) *Cooper* v. *Hubbuck*, 9 Jur. 575; 12 C. B. 456. So is *Frewen* v. *Phillips*, as to indefeasibility after twenty years; 11 C. B. 449; 7 Jur. (N. S.) 1246; 30 L. J., C. P., 356.

"agreement expressly made by deed or writ-"ing" (1).

And by section 6,—In the several cases mentioned in and provided for by the Act no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act, as may be applicable to the case and to the nature of the claim. It seems to follow, from this legislative provision, that lights may now be claimed, first, in respect of twenty years' possession, without interruption; secondly, by express grant; and lastly, by virtue of such an implied grant or covenant as will prevent a grantor or lessor from impeaching his own deed or license.

Now, although the period of twenty years may be defeated by an interruption, yet if nineteen years elapse, the person enjoying lights may be in a more favourable position than before, because, as soon as the period of nineteen years has turned, the right at the end of twenty years becomes absolute, notwithstanding the

(1) In *Truscott* v. *The Merchant Taylors' Company*, in error on a bill of exceptions; 2 Jur. (N. S.) 357.

pendency of an action; for as there must be an acquiescence for a year, the twentieth year of enjoyment must elapse before the period for acquiescence. Under such circumstances it was held that the plaintiff acquired a title under the statute. The interruption had not been acquiesced in for one year. Maule, J., considered the omission of the words "as of right" to have happened on purpose. So if the interruption should take place within the twenty years, and then the twenty years should elapse, and afterwards, *but within the year*, an action should be brought, the case will be the same (1).

An obstruction had existed for more than one year, when a promise was made to remove it. Before twelve months had elapsed since the promise, proceedings were taken by the owner of the light. The interruption was held insufficient (2).

A verbal permission will suffice under the

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(1) *Flight* v. *Thomas*, 3 Per. & D. 402; 5 Jur. (N. S.) 811. The plea must show an easement, else it will be bad, even after verdict; 7 Dowl. P. C. 741., *Flight* v. *Thomas*. This judgment was affirmed in the House of Lords, 11 Ad. & El. 688; 8 Cl. & F. 231; 1 West, 671.

(2) *Gale* v. *Abbot*, 8 Jur. (N. S.) 987.

statute, and the enjoyment needs not to be adverse. The actual user for twenty years will make the right absolute. The defendant proposed to give evidence of a negotiation for an *agreement* to enjoy this light, and that the agreement could not be found. But Tindal, C. J., said, that if it were so, no defence against obstruction would be disclosed (1).

1. *By Twenty Years' Possession.*

Whatever opinions might have prevailed before the Act, upon the possibility of acquiring a title, within twenty years, to undisturbed lights, it is now finally settled, that such a term alone will give the right at present. There is an end, therefore, of the notion of mere occupancy yielding the privilege. To a great extent, indeed, the section now before us upholds the presumptions which were so often combated under the old law. The presumptions are abolished; but the term which they almost universally favoured is at once

(1) *The Mayor, &c., of London* v. *The Pewterers' Company*, 2 Moo. & Rob. 409. The litigation upon the statute of prescriptions as to lights was foreseen by the writers in "The Jurist" soon after the Act had passed. See 1 Jur. 810, 859; 2 Jur. 125.

adopted. At first it was impossible to gain an invincible title without an absolutely prescriptive proof; then the term of twenty years was struggled for with various success; and now, lastly, it is fixed by statute as an indefeasible bar to let or hindrance. Before the statute the claim of twenty years made out a *primâ facie* case; now it is conclusive. But the Act has a much more extensive scope than may at first be imagined. It seems, that reversioners of all kinds are bound after this term of twenty years; for it will be observed, that the eighth section relates to ways and water-courses only. Those authorities, accordingly, which involve the question of cognizance or not on the part of a landlord, or of inability to confer a grant in the case of ecclesiastical persons, are now no longer applicable after the twenty years. The principles laid down in *Daniel* v. *North*, *Cross* v. *Lewis*, and *Barker* v. *Richardson*, will not now prevail against possession for the term alluded to. If a man lease for years, and his tenant permit the user of lights for twenty years, the landlord can no longer interfere, as reversioner, at the end of the term, though he may sue, as reversioner, during its existence. If a man lease for twenty-one years, and his tenant

permit the easement of a new light, the lessor must interest himself before twenty years have elapsed, or he will be finally concluded. In such a case, also, as *Barker* v. *Richardson*, before mentioned, the claim of the plaintiff would now be held good. Nevertheless, it follows from hence, that, as on the one hand, this term will now give an absolute right; on the other, it is competent, generally speaking, to build up against lights at any period within twenty years.

And here we have mentioned, that, according to the fourth section, an act of interruption must be acquiesced in for one year after notice both of the thing done as well as of the person authorizing or causing it.

Therefore, if, under ordinary circumstances, A. be desirous of destroying B.'s title to light before the end of twenty years, he must give B. notice of his act, as well as his own participation in it; and then if B. submit to or acquiesce in the disturbance for one year, he will lose his claim to the uninterrupted enjoyment he otherwise would acquire. It seems, also, that the notice should be given to the landlord as well as to B. the tenant, otherwise the former might set up a want of notice against the evi-

dence of interruption. In this case, it is suggested, that presumptions will not be wholly shut out; for, upon occasions of very obvious interruptions, it is not unlikely but that judges will direct juries to presume notice, especially where the acquiescence of both tenant and reversioner appears probable. The best method, consequently, in fitting up boards or palings, or building in any way so as to obstruct light, will be to serve both parties with notice, and that will be such an interruption as the law contemplates within this section.

The interruption must be of a physical character. The payment of rent is not such. An interruption within the meaning of the third section must be such an interruption as is contemplated by the fourth section. There must be a discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year. Judgment reversed upon error in error from a bill of exceptions to the ruling of Pollock, C. B. (1).

[Unless it shall appear that the same are

(1) *The Plasterers' Company* v. *The Parish Clerks' Company*, 6 Ex. 639. Error from the Exchequer upon a bill of exceptions to the ruling of Pollock, C. B. Judgment reversed. 20 L. J., Ex., 362; 15 Jur. 965.

enjoyed by some consent or agreement, &c.] These words hardly need any explanation. They mean, that if the owner of a house should suffer his neighbour, for instance, to put out a light, the license being granted by deed, the right to such a window should not be deemed absolute, even after twenty years' enjoyment, because of the prior consent and sufferance. Such a case might occur in workshops adjoining each other, where a mutuality of light might be convenient, and, indeed, on other occasions.

2 & 3. *By Grants or Covenants, expressed or implied.*

Express grants, or covenants, as we have already observed, need scarcely any mention, because their meaning is too plain in general for mistake; but if a landlord lease his house to A., and then, having made no reservation of the lights, he seek to obstruct the windows of the dwelling which he has demised, here he is acting in contravention, not of an express, but of an implied grant; for he must be taken to have yielded up all the benefits and appurtenances of the things demised; and to bear him harmless in interfering with his tenant's

light, would be to enable him to derogate from his own grant, which the law will not allow. Upon such an occasion it was found in vain to allege the want of antiquity in the house. The defendant had fixed boards to the windows of the plaintiff's house; the latter brought his action for a nuisance; and the Court were quite clear in favour of the plaintiff (1). And Hale, C. J., said, that if a man were to build a house upon his own ground, and then grant the house to A., and also certain lands adjoining to B., B. could not build up against the lights of A. *A fortiori*, the defendant's conduct on this occasion could not be justified (2). A case decided in the Common Pleas, at Westminster, contains nearly a similar statement of facts. Here the landlord owned two adjoining houses, each of which had some ancient windows. He leased one of these houses to B., who assigned it to G., and G. took a new lease from the landlord in the next year. Then, with respect to the other house, the landlord leased that also to

(1) 1 Ventr. 237, *Cox* v. *Matthews;* 3 Keb. 133; 6 Mod. 116, *Rosewell* v. *Prior;* 1 Ld. Raym. 713; Holt, 500.

(2) 1 Ventr. 239. See 2 Ro. Rep. 241, *Gwin* v. *Damport.*

C., in the same year in which the new lease was granted to G.; and it is important to observe, that the new lease to G. was made before that to C. Some alteration had been made in the windows of C.'s house before the demise to him, and G. having obstructed these altered lights, an action upon the case was brought by C. Upon the disclosure of these facts, Lord Chief Justice Tindal held, that although the interests of G.'s term, which came to him by assignment, would not have been affected by the landlord's lease to C. without more, yet that, by accepting a new lease from the landlord, G. surrendered the old term by operation of law; consequently, the new lease, being derived out of the landlord's reversion, became subject to the rights already granted by the landlord to C. Therefore, the jury having found that the alteration in the windows took place before the lease to C., the landlord could neither be held competent to obstruct them himself, nor to convey to any other person a right to do so. There was a verdict for the plaintiff (1).

This decision proves that the tenant cannot obstruct lights with greater impunity than the

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(1) Moo. & Malk. 396, *Coutts* v. *Gorham*.

landlord, because the original implied grant continues so as to give a right of action against the lessee or assignee.

The tenant, in fact, cannot stand in a better position than his landlord. Therefore, if the landlord cannot obstruct, an injunction will be granted against the tenant (1).

So again, if, instead of letting the property, as in the last case, the owner dispose of it absolutely, the law remains the same, for the vendee cannot exercise more general rights than his vendor. A case, much relied upon since, has established this point. A man had erected a house upon his own land, and he then sold the house to one person, and the adjoining ground to another. The vendee of the land, however, obstructed the lights of the house by piling up timber, and upon this an action was brought. The Court took some time to consider of their decision, and one (2) of the judges dissented from his brethren when judgment was given; but the majority (3) held, that the plaintiff should recover. Kelyng, J., seemed to

(1) *Davies* v. *Marshall*, 1 Drew & Sm. 557; 7 Jur. (N. S.) 720.

(2) Kelyng.

(3) Twisden and Wyndham.

intimate, that if the land were sold first, and the house afterwards, the vendee of the former might stop the lights; but to this it was answered, by Twisden, J., that in either case the easement could not be obstructed in the hands of the vendor or his assignees. The plaintiff accordingly had judgment (1). Twisden, J., added that the matter had been argued, and distinctions taken, in a prior action brought concerning a house in Shoe Lane, and that the decision was in favour of the plaintiff (2).

Here, again, the implied grant was recognised; and, notwithstanding the resistance of Judge Kelyng, the determination in question was acted upon as good authority in a comparatively modern case. Two houses, part of a range of buildings, and built at the same time, were sold by auction by the same proprietor. A. bought one, and the defendant the other.

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(1) 1 Lev. 122, *Palmer* v. *Fletcher;* Th. Raym. 87; 1 Sid. 167; 2 Keb. 553, 625, 794; S. C., cited 1 Show. 64. It seems that there were two judgments in this case, one on special verdict, the other on demurrer, and that the damages awarded under the writ of inquiry were as much as the rent of the house. The Court thought the measure of damages outrageous, and stayed the filing of the writ; 2 Keb. 836.

(2) 1 Sid. 167; 1 Lev. 122.

A. granted a lease of his purchase to the plaintiff for twenty-one years. The defendant having built an additional room, which intercepted his, plaintiff's, light, he went to trial at the Gloucester assizes, but was nonsuited by Graham, B., with liberty to apply to enter a verdict in his favour, with nominal damages. Much attention was paid to the arguments on both sides by the Court, and the result was, that they considered *Palmer* v. *Fletcher* to be decisive upon the question; that the plaintiff ought not to sustain a derogation of any right which he acquired by his purchase; and that, as the openings for windows were sufficiently visible at the time of the sale, the Court could not do otherwise than recognise an implied condition, that nothing would afterwards be done to obstruct the light. And Mr. Baron Wood considered that the plaintiff had claimed a right by grant upon this occasion, and that when the house was granted to A., the lessor, he became as fully the grantee of everything necessary to its enjoyment, as though it had been said at the time that no one should obstruct the then existing light. The rule, was, therefore, made absolute (1).

(1) 1 Price, 27, *Compton* v. *Richards*. See 2 Atk., 83,

But if openings be left in walls, so undefined as to make it uncertain whether they have been left for doors or windows, no implied grant can be entertained. An easement of this kind must be apparent and continuous, so that a claim of a right of way failed under such circumstances; whereas there being a clear development of one window, as far as that, the plaintiff was held to be entitled to a verdict (1). It is, perhaps, worthy of remark here, that not only does the right to the easement of light belong to the purchaser or lessee upon occasions such as those we have just spoken of, but the privilege also of resisting and vindicating any intrusions on or interruptions of that easement; and it will be easily perceived that the learned baron took this extended view of the subject; for, in many conveyances, the word "appurtenances" is used, under which lights will pass as of course; or (which is more frequent) the word "lights" is particularly mentioned, and thus there is an express grant so far; but in the instances above

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The East India Company v. *Vincent.* But we shall find that a stranger may obstruct lights under the circumstances mentioned in the last pages, when we come to speak of "obstructions."

(1) *Glave* v. *Harding*, 27 L. J., Ex., 286.

cited a title to the future enjoyment of the grant absolutely and uninterruptedly is considered to have been conveyed by implication. And in a late case of a similar kind it was held to make no difference that, in the conveyance to the plaintiff, his house was described as bounded by *building ground* belonging to the defendant. It had been insinuated, in argument, that the plaintiff had taken his house subject to future erections; else, it was said, that the words "building ground" had no meaning (1).

Now, in this last case of implied covenants, it does not seem that the statute will make any difference, notwithstanding the abolition of presumptions; for both the third and sixth sections have obvious reference to cases where time is of the essence of the matter; whereas in the decisions just cited another term is brought into the proposition, namely, a common law principle, that a man shall not, directly or indirectly, avoid his own grant. This act of the landlord or vendor operates, as it were, by estoppel. The doctrine of prescription as contemplated by the statute seems to be beside

(1) 9 Bing. 305, *Swansborough* v. *Coventry*.

the question, and another principle intervenes, which prohibits a man from nullifying his own deed. It is presumed, therefore, that the sixth section does not apply to the last mode of claiming lights; that parties taking under the same conveyance cannot build up against each other; and that a lessor cannot do his tenant a wrong in this respect, even within the term of twenty years from the commencement of the respective interests.

By section 5 it is declared, that in all actions upon the case, and other pleadings wherein the party claiming may now, by law, allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible as evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this Act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement in

respect whereof the same is claimed, for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name and right of the owner thereof, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

So that under this section the right is to be pleaded in the same manner as you declare in actions for disturbance, and the answer to the action is to be specially replied.

Lastly, by section 7 there is a proviso that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, feme-covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted,

until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

Therefore it follows, that as the privilege of light is declared to be absolute and indefeasible after twenty years' possession, the rights of the persons mentioned in the proviso will be barred after that time, notwithstanding their respective incapacities.

A license to put up a ladder is not a license to put out a window in answer to a request for that purpose. Therefore the plaintiff, who made no answer to the request about the window, although he gave leave to put up the ladder, was allowed to obstruct the window when put out (1). These parties became again involved in law respecting light. Blanchard brought an action against Bridges for an obstruction. Blanchard shewed that Bridges had witnessed the progress of the building, and that he was a party to the deed which gave Blanchard a title to the house, Bridges having

(1) *Bridges* v. *Blanchard*, 3 Nev. & M. 692.

sold the adjoining land to Blanchard. . . . This was no license from Bridges for Blanchard to put out windows, nor was it a covenant. Bridges, in permitting Blanchard to build to the extremity of his land, expressly reserved to himself the right of building to the extremity of his own land (1).

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(1) *Blanchard* v. *Bridges*, 4 Ad. & El. 176; 5 Nev. & M. 567.

CHAPTER II.

User of Lights.

It will not be necessary for us to enter at length upon this subject of user, for many of the points relating to it are necessarily involved in the consideration of obstructions (to which we shall immediately hasten), and there is not any remedy, in general, for an undue and improper use of this easement, except the building up against it, which raises instantly the question of obstruction. The well-known maxim, however, *Sic utere tuo ut alienum non lædas*, is one which every one entitled to the enjoyment of lights will do well to remember, since, although no action may be sustainable for an immoderate enlargement, or other unjustifiable use of windows, serious inconveniences may arise from the efforts of other parties to block up or restrain the nuisance. Thus, where the plaintiff had removed some blinds which fronted the defendant's garden, and thus acquired a much larger easement of light than

he possessed before, a paling, put up by the defendant to resist the innovation, seems only to have been held illegal by Lord Kenyon because, in fact, it made the plaintiff's rooms more dark than they had been before the taking away of the blinds (1). The defendant had exceeded the right which he possessed, of repelling the nuisance, by diminishing the quantum of light enjoyed previously by the plaintiff, which it was deemed by the learned Chief Justice incompetent for him to do. So, again, where the plaintiff had raised and enlarged an ancient window, the defendant, the owner of the adjoining ground, erected a building which covered several inches of the space occupied by the old window, still, however, admitting more light to pass through the new than the plaintiff had enjoyed before the alteration; and here, again, the plaintiff recovered, although, had the defendant acted with judgment, he might have repressed this undue user of the light on the part of the plaintiff; for Mr. Justice Le Blanc, who tried the cause, admitted, that the defendant might have obstructed the enlarged part of the

(1) 4 Esp. 69, *Cotterell* v. *Griffiths*.

window, but that he clearly could not invade any of the space occupied by the window as it originally stood; the light and air must pass through an ancient window as formerly; for, to the extent of its size, in the first instance, it is privileged (1).

It is dangerous to meddle with the ancient mode of user. The easement may be altogether lost (2). The plaintiff and the defendant had houses in the same court at opposite sides. Nineteen years before the action the plaintiff rebuilt his house, putting new windows into a raised story, and altering the dimensions of the old windows. At length, in 1850, the defendant rebuilt, and raised a story likewise, obstructing both the new and old lights of the plaintiff. It was proved that the defendant could not have succeeded in blocking out the new windows without in some way meddling with the privileged windows. A verdict having passed for the plaintiff, the Court held, that

(1) 3 Camp. 80, *Chandler* v. *Thompson;* and see also, on this subject, 2 Vern. 646; 2 Atk. 83, where it was said, that if you open a window against another, he may build up against you.

(2) *Garritt* v. *Sharpe*, 3 Ad. & El. 320; 4 Nev. & M. 834.

the action was not maintainable (1). When one of two neighbours, occupying houses near each other, raises his house a story, he empowers the other to do the same at any time within twenty years (2). Again, the plaintiff thought fit to alter the position of two windows, so as to raise a question as to the right of the defendant to obstruct, and Kindersley, V. C., directed an action at law, making in the meantime an interim order as beneficial as might be to both parties (3). It was no good objection that the plaintiff was not the occupier, nor had any intention of occupying. So, again, the owner of an opposite house altered his lights both in position and size, and confounded them in some measure with new windows. The other owner could not obstruct these new lights without building

(1) *Renshaw* v. *Bean*, 18 Q. B. 112; 16 Jur. 814; 21 L. J., Q. B., 219.

(2) 16 Jur. 817; 21 L. J., Q. B., 223, Lord Campbell, C. J.

(3) *Wilson* v. *Townend*, 4 Drew & Sm. 324; 6 Jur. (N. S.) 1109; 30 L. J., Ch., 25.

As to the order, see *Sutton* v. *Montfort*, 4 Sim. 565. Kindersley, V. C., intimated his preference of *Chandler* v. *Thompson* over *Renshaw* v. *Bean*, had not the latter been decided in full Court.

against some portions of the old windows. These were not the identical unchanged lights, and the plaintiff here compelled the owner of the servient tenement to build up against this ancient section of windows (1). So it was where the plaintiff enlarged some ancient, and put out some new windows, upon which the defendant, being unable to block out the new lights without in some way obstructing the old, built a wall. The plaintiff then restored the windows to their ancient state. But he had abandoned his rights. In any other way the defendant would not only have lost the costs of his building caused by the plaintiff, but he would likewise be liable in damages. The verdict was entered for the defendant (2). However, if, instead of building the wall, the plaintiff had applied to a Court of equity, the restoration of the windows to their ancient state would have been directed, and an injunction would have issued to hinder any ob-

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(1) *Hutchinson* v. *Copestake*, in error, 9 C. B. (N. S.) 863; 8 Jur. (N. S.) 54; 31 L. J., C. P., 19.

(2) *Jones* v. *Tapling*, in error, 11 C. B. 283; 12 C. B. 826; 31 L. J., C. P., 110, 142; 9 Jur. (N. S.) 462. See comments upon these cases, 9 Jur. pt. 2, p. 175.

struction of the old windows after the restoration. But the plaintiff must not incur unnecessary delay. In that case the party injured will be left to his rights at law, and the Court of Chancery will retain the bill for a year (1).

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(1) *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 L. J., Ch., 123; 7 Jur. (N. S.) 457. See also *Turner* v. *Spooner*, 1 Drew & Sm. 467; 7 Jur. (N. S.) 1068; 30 L. J., Ch., 801, *post*.

CHAPTER III.

Obstructions to Lights.

We now come to that which is, perhaps, the most important topic connected with this subject; namely, obstructions to light. This point deserves particular attention, because it is not every interruption of the nature above mentioned which will support an action or suit; for there are many acts which occasion the deprivation of accustomed light, and yet the individual incommoded is not entitled to any redress: it therefore becomes of some moment to ascertain what shall be said in law to be an obstruction. On several occasions, too, an inconvenience, occasioned by shutting out the usual supply of light and air, cannot be remedied in any respect; as, for instance, the destruction of a prospect in consequence of intervening buildings. And, again, assuming that the injury done has been such as would warrant the bringing of an action, possibly the house obstructed may not be within the pro-

tection of the law upon the occasion, and thus the proceedings might fail upon that ground. Then, further, supposing that not only the mischief done were sufficient to justify a suit, but that the house were, under ordinary circumstances, a privileged place, still, there might (as we shall fully see by-and-by) be answers to such an action, of a character which would warrant the judges in holding that no legal obstruction had been, in fact, committed, and, consequently, that the plaintiff could have no redress.

The subject seems to divide itself into three parts :—

1. What shall be said, literally speaking, to be such an obstruction as the law will take notice of?

2. What houses shall be considered so privileged as that it may not be lawful to darken their windows? and what not?

3. What are the remedies allowed by law in cases of stopping lights?

Nature of Obstructions.

As to the first point, it is observed by Lord Coke, that the common law prohibits the building of any edifice so as to be a common nuisance,

or a nuisance to any man in his house, as the stopping up of his light, &c. (1), which means the light of his *house*. For the use of an open space of ground, in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air (2).

But the light of a manufactory will be regarded, as where the plaintiff and defendant held adjoining pieces of ground under a common landlord, and the plaintiff then erected a manufactory with his landlord's leave, and without objection by the defendant. The Court granted an interim injunction, the plaintiff undertaking to bring an action forthwith, and make good damages (3).

An individual who complains that his windows have been interrupted must be taken to have enjoyed the easement of light for a certain time previous to the obstruction, and

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(1) 3 Inst. 201; 9 Rep. 58, *Aldred's* case.

(2) *Roberts* v. *Macord*, 1 Moo. & Rob. 230. The same principle with reference to air applies to a windmill; *Webb* v. *Bird*, 8 Jur. (N. S.) 621; 30 L. J., C. P., 384.

(3) *Crook* v. *Wilson*, 3 W. R. 378.

the test of the injury is, whether the accustomed portion of light has or not been materially diminished. It is not necessary that a total privation of light should be sustained in order to make good the charge, nor that the wrong inflicted should strictly verify the old precedent, namely, *Quod messuagium horridâ tenebritate obscuratum fuit.* The principal question for the consideration of the jury seems to be, whether the plaintiff's house has been rendered more uncomfortably dark than before the nuisance. Thus the plaintiff proved, in an action on the case, that he was possessed of an ancient house, the windows of which looked into the defendant's garden, and that the defendant had erected a large paling, which had completely darkened them. The defence was, that these windows had never been completely open, by reason of certain blinds, fastened to the frames, and which prevented the plaintiff from seeing into the defendant's garden: the blinds sloped upwards, and only served for the admission of light. It was further said, that the plaintiff had thrown down these blinds, and had thus acquired an uninterrupted view over the defendant's premises; that it was not competent for the plaintiff, who had only a qualified right, to make the

alteration complained of, and thus possess himself of an casement in every respect unqualified; and that the defendant, therefore, was justified in preventing a mode of enjoyment to which the other party was not entitled. Upon this Lord Kenyon asked, whether the paling thus erected had made the rooms darker than when the blinds were up; and, being answered in the affirmative, his lordship said, that the plaintiff was clearly entitled to recover, and a verdict was accordingly returned in his favour (1).

So where a plaintiff has enlarged a window in his dwelling-house, both in height and width, by substituting a sash frame for a leaded casement, Le Blanc, J., held, that although that part of the new window which constituted the enlargement might be lawfully obstructed, yet

(1) 4 Esp. 69, *Cotterell* v. *Griffiths*. The defendant complained also, upon this occasion, that the plaintiff had disturbed the privacy of his garden by removing the blinds. It is observable, that no action can be maintained for an intrusion of this sort, although it has been said that such proceedings may be read of in the books; but Lord Chief Justice Eyre has declared, that the party injured cannot sue for the grievance, the only remedy being to build on the adjoining land, opposite to the offensive window; 3 Camp. 82, by Le Blanc, J., at Shrewsbury.

that the whole of the space occupied by the ancient window was privileged, without reference to any advantage the plaintiff might have derived by changing the form of the window (1). Yet this case must be read with attention. If there be no encroachment on the old site, but only an enlargement, affording greater facilities of light, the adjoining owner cannot reduce the light. There is no alteration in the aperture or position, but only in the framework and glazing. Moreover, the owner of the dominant tenement is not confined to a particular species of user (2). The case is different where an encroachment occurs. Here, although the defendant could not obstruct the new, without in some measure meddling with the old lights, an injunction was refused. In order to obtain the injunction, the plaintiff must close the new light, and restore the ancient position (3). Thus it has been proved, that those obstructions which darken the accustomed lights of a house are in their nature objectionable, and that a defendant will be un-

(1) 3 Camp. 80, *Chandler* v. *Thompson*.

(2) *Turner* v. *Spooner*, 1 Drew & Sm. 467; 7 Jur. (N. S.) 1068; 30 L. J., Ch., 804.

(3) *Weatherley* v. *Ross*, 32 L. J., Ch., 128. *Renshaw* v. *Bean* was approved. 18 Q. B. 112; 21 L. J., Q. B., 219; 16 Jur. 814.

able to resist a verdict where the creation of such nuisances is brought home to him. But it will be clearly perceived, from hence, how important it is for a jury to consider the quantum of light enjoyed, because a plaintiff is not entitled to a verdict at their hands which may establish a more extended easement than he has been wont to enjoy (1); so that, in *Chandler* v. *Thompson*, the defendant's error consisted, not in raising an obstruction to the plaintiff's light, but in building his paling so high as to hinder his neighbour from the benefit of that portion of light which came in at the windows when the blinds were up, that is to say, before the alteration. So, admitting the right to obstruct a new light, if in so doing the ancient light is unavoidably abridged, the act may be justified. But the facts must appear on the record, so that, for want of a plea to that effect, judgment passed for the plaintiff (2). Some decisions shall be immediately cited to illustrate this distinction, and show the dividing point, as it were,

(1) Therefore not for an increase of light by enlarging windows; by Wilmot, C. J., in *Dougal* v. *Wilson*, cited 2 Wms. Saund. 175, (a); S. P., 2 Vern. 646, *Cherrington* v. *Abney*.

(2) *Binkes* v. *Pash*, 11 C. B. 324; 8 Jur. (N. S.) 360; 31 L. J., C. P., 121.

between the accustomed supply and an excess of light.

An action on the case was brought for stopping up ancient lights. It appeared that the plaintiff's house had been used for twenty years as a malt-house, and had been subsequently converted into a dwelling, that is to say, a parish workhouse, which was inhabited by paupers. The defendant had set up a wall on the adjoining ground, of which he was the owner, and this was the nuisance complained of; and here the distinction above adverted to was clearly recognised by Lord C. B. Macdonald. The question was, whether such a quantity of light had been obstructed by the alteration as would have made the house, in its ancient state, as a malt-house, more dark than before. No man could, by any act of his own, suddenly impose a restriction upon his neighbour: the jury would consider, therefore, whether a proper degree of light for the purpose of making malt had been prevented from entering, in consequence of the wall which the defendant had erected. The verdict was for the defendant (1).

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(1) 1 Camp. 320, *Martin* v. *Goble.*

Best, C. J., carried this point a little further, in a case where the issues were, first, whether the plaintiff's ancient lights belonging to his house in the city of Norwich had been illegally obstructed by a certain building of the defendant; and, secondly, as to the extent of the damage sustained, the first issue being found in the affirmative. It appeared in evidence, that the plaintiff's light had certainly been diminished, and it was therefore contended that he was, at all events, entitled to a verdict upon the first issue, any obstruction of lights being illegal. But Best, C. J., told the jury, that it was not sufficient to constitute a legal obstruction that the plaintiff had, in fact, less light than before, nor that his warehouse, which was the place principally affected, could not be used for all the purposes to which it might otherwise have been applied. There must be, added the C. J., a substantial privation of light, in order to maintain the present issue, such as to render the house uncomfortable, and to prevent the plaintiff from carrying on his business as beneficially as before. The jury were then directed to distinguish between a partial inconvenience and a real injury.

The verdict was for the defendant on both the issues (1).

"In the case of obstruction of light," said Lord Denman, "we leave it to the jury whether "any real inconvenience is sustained, though "some light may demonstrably have been "obscured" (2).

It should be remarked here, that this decision does not clash with that of *Cotterell* v. *Griffiths*, before cited, inasmuch as the high paling obviously darkened the premises of the plaintiff, in the latter case, in a manner extremely prejudicial to the enjoyment of his dwelling; and it will be recollected, that the last authorities which we have mentioned relate to obstructions in houses used for the purpose of trade, where a partial diminution of light does not always create so baneful an effect as would happen, under such circumstances, in rooms used exclusively for habitation. Thus, it may be said, that such an interruption of lights as will render a dwelling less comfortable, or a place of business less beneficial, will be an injury for which an action may be maintained.

(1) 2 C. & P. 465, *Back* v. *Stacey*; *Parker* v. *Smith*, 5 C. & P. 438.

(2) In *R.* v. *Sharpe*, 3 Railw. Ca. 35.

The defendant erected a building opposite to certain windows, and a question arose as to the amount of light withdrawn. Lord Denman said, that to sustain the action a considerable diminution of light must have been suffered, and that merely taking off a ray or two of light would be insufficient (1). So where the building causing the obstruction was separated from the windows obstructed by a public street in the metropolis, it was left to the jury to say whether there had been any substantial diminution of light. And the judge observed, that whether the intervention of a public street would be a good defence, was matter of law (2). An upright screen of translucent plated glass, raised thirty-five feet from the ground, and at a distance of thirty feet from the adjoining house, was held not to be an obstruction (3).

Hence, it will be easily conceded, that a prospect cannot be held so valuable to the person who enjoys it, as to enable him to sue for an obstruction of it. Thus, it was said, in an old

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(1) *Pringle* v. *Wenham*, 7 C. & P. 377. Verdict for plaintiff.

(2) *Roe* v. *Marquis of Westmeath*, 7 L. T. 82.

(3) *Radcliffe* v. *Duke of Portland*, 8 Jur. (N. S.) 1007; 3 Giff. 702.

case, by Wray, C. J., that no action lies for stopping a prospect, which is a matter only of delight, and not of necessity; and yet, said the learned Chief Justice, it is a great commendation of a house if it has a long and large prospect (1). Nevertheless, it seems, that the Court of Common Pleas had entertained an action for obstructing a prospect on one occasion, but the judgment was reversed in error; and by Twisden, J., "Why may I not build up a wall, that "another man may not look into my yard? "Prospects may be stopped, so as you do not "darken the light" (2).

To darken a prospect, therefore, is not a nuisance (3). The same point was raised before Lord Hardwicke, as to Gray's Inn Gardens, but the Chancellor refused to interfere. In a plain case of nuisance it might be different (4).

We have now shown the nature of obstructions. Referring the reader, however, at the same time, to the fourth section of 2 & 3 W. 4, c. 71, which has been commented upon in a

(1) 9 Rep. 58.

(2) 1 Mod. 55, *Knowles* v. *Richardson;* 2 Keb. 611, 642.

(3) In *Arnold* v. *Jefferson*, Holt, Ca. 499.

(4) *Att.-Gen.* v. *Doughty*, 2 Ves. sen. 453. The

former page, we will now assume, for the sake of making the subject more clear, that the particular mischief complained of has been fully proved. It must further appear, that the windows intruded upon are entitled to the protection of the law. It therefore becomes necessary to ascertain what shall be said to be such a house.

What an Ancient House, &c.

Before the statute, of which we have already said so much, the windows of a dwelling or other place, which had existed from time immemorial, were always considered as privileged, and secure from all invasion, the custom of London enabling persons to build on ancient foundations alone excepted (1). But it was considered, for many centuries, that this continuation of the light, time out of mind, was absolutely indispensable; so that, under ordinary circumstances, if the origin of the easement could have been traced, the plaintiff

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parties might build, but at their peril. See 2 Bro. Ch. Ca. 64, n. (2). "A man can bring no action for "the loss of a look out or a prospect;" 7 C. & P 411; by Parke, B.

(1) See *ante*, p. 11.

failed. Thus it was agreed, by all the judges, in the reign of Queen Elizabeth, that, if two men be owners of two parcels of land adjoining, and the one build a house with windows looking towards the land of the other, and the lights so made have continued for thirty or forty years, yet that the other person might, notwithstanding, after that lapse of time, build against those windows; and that the first cannot have any action, because it was his folly to have built his house so near to his neighbour's land (1). The law, however, looked with more indulgence upon rights in more modern times; and it was intimated, by Lord Kenyon, that Wilmot, C. J., was the first judge who held, that the privilege of ancient lights should attach to the free and uninterrupted possession of windows for twenty years (2). The learned judges, however, did not suddenly establish the new doctrine. In one case, where the new law was received, the defendant was attempting to show that the lights had not existed for more than sixty years, when Wilmot, C. J., said, that if a man had possessed lights for so

(1) Cro. El. 118, *Bury* v. *Pope*; 1 Leon. 168.

(2) 4 Esp. 70; said by Lord Kenyon to have been so determined in *Upsdell* v. *Wilson*.

long a time, no other person could stop them. Such a possession evidenced a grant of the liberty to make them; it proved an agreement to allow them. If, said the judge, I cannot be disturbed in my house after sixty years, shall I be disturbed in my lights? The Chief Justice then said, that he thought a much shorter time than sixty years might be sufficient, but that here there had been such a possession (1). In a previous case, where it appeared that the lights had been enjoyed for forty years, and that they were then obstructed by the owner of the adjoining ground, Wilmot, J., held, that an action would lie; and he said, that as twenty years were sufficient to give a title in ejectment, he saw no reason why it should not be sufficient to possess, for such a period, uninterruptedly, any easement belonging to the house (2). The same doctrine prevailed again in a case before Gould, J., tried some years afterwards. An unbroken possession was proved for twenty-five years, and the learned judge then called on the defendant's counsel to show whether this claim could be

(1) 2 Wms. Saund. 175, (a), *Dougal* v. *Wilson;* Sittings in C. B. Trin. 9 Geo. 3, cited there.

(2) 2 Wms. Saund. 175, (a), *Lewis* v. *Price;* Worcester Sp. Assizes, 1761, cited there.

answered: upon this, the defendant offered a grant from the former owner of the defendant's premises to the plaintiff's predecessor, dated thirty-six years since, by which leave was granted to put out a particular window, and contended that it must from thence be presumed, that the plaintiff never had any other grant, and thus there would be an answer to the presumption arising from length of possession. Gould, J., however, thought, that as the grant related to a particular window which was not included in the action, and as there was no exception of or reference to any other in the grant, the case was not altered. The defendant then relied on a possession previous to these twenty-five years; but the judge overruled this objection likewise, observing, that if the defendant had any evidence to explain the possession within the twenty years, as that it had been limited or modified, or bad in its commencement, that would be material. The defendant, however, offering no such evidence, a verdict passed for the plaintiff. Upon a motion for a new trial, it appeared that some degree of misapprehension had taken place as to the ruling of the judge; the counsel in support of the rule insisting, that Gould, J.,

had holden the possession for twenty years to be an absolute bar under all circumstances, and that the judge had refused permission to rebut the presumption raised; whereas the learned judge, upon being consulted by Mr. Justice Ashhurst, said, that he had no idea but that it was a question for a jury; and that, had the counsel for the defendant requested it, he would have left the matter to the jury; the rule was then discharged (1). So, again, sixteen years afterwards, in a case where the defendant objected that a window broken out by the plaintiff, in the wall which adjoined the defendant's garden, was not ancient; it appeared, upon the examination of a witness, to have been broken open thirty years since, and Lord Kenyon said that was sufficient, and a verdict was found for the plaintiff (2). A possession for twenty years, therefore, of lights, in any particular situation, was, according to the doctrine universally received and acted upon, *primâ facie* evidence of a title to the easement. And the

(1) 2 Wms. Saund. 175, (c), *Darwin* v. *Upton;* Mich. 26 G. 3.

(2) 4 Esp. 69, *Cotterell* v. *Griffiths.* See also Moo. & Malk. 400, *Penwarden* v. *Ching;* 5 Taunt. 465, *Titterton* v. *Conyers.*

Act of William the Fourth confirmed this resolution of the judges, as we have already mentioned at large.

A was seised of a house and land. In 1855 he granted the land to trustees for ninety-nine years, and in the next year granted it in fee. In 1857 he granted the house to G., under whom the plaintiff was entitled, but there was neither limitation nor covenant as to light. The defendant built under the authority of the trustees, obstructing light which for twenty years had come to the house of the plaintiff. If the grantees of the land might have built upon it in 1856, the conveyance of the house in 1857, to the person from whom the plaintiff obtained possession, could not alter the case. The defendant had judgment (1).

New Houses.

But not only are ancient houses, and such as have had windows for the above period, privileged from obstructions; new dwellings may also gain a right to the same protection, as we have already seen when treating of the claim

(1) *White* v. *Bass*, 7 Hurl. & N. 722; 8 Jur. (N. S.) 312; 31 L. J., Ex., 283.

by implied grant. This point need not be mentioned here at length, because the authorities in support of it have been already collected in a former page: the purport of them was, as we may recollect, that if a person sell a house with its appurtenances, he cannot afterwards seek to destroy the use of those windows which existed at the time of the sale in the property disposed of; and that the vendee of the adjoining land, who has made his purchase of the proprietor of the house, is equally bound to respect his neighbour's lights (1). And, again, if a person should buy a new house at an auction, his neighbour, who becomes the purchaser of an adjoining new house at the same time, belonging to the same vendor, cannot obstruct the opposite or contiguous lights, because he takes his property subject to the rights of the vendor, who could not, in any way, be justified in stopping the lights of either house when sold, inasmuch as he could not derogate from his own grant (2). A new house may thus become privileged within the period of twenty

(1) *Ante*, p. 41; 1 Ventr. 237—239; 6 Mod. 116; 1 Lev. 122; M. & M. 396; 9 Bingh. 305.

(2) See *ante*, p. 43; 1 Price, 27.

years, above mentioned; and so, also, may new windows in an old house, which have not been enjoyed for twenty years, if the effect of stopping them were to derogate from an express grant, or implied condition.

What Houses are not Privileged.

We have observed, however, that circumstances may occur to prevent a house from gaining or being entitled to the privilege of preserving its lights unobstructed; and it is quite clear, that unless protected by some of the implied conditions above alluded to, windows under the age of twenty years, or thereabouts, may be lawfully interrupted. Thus, in a case where *Palmer* v. *Fletcher* had been recognised as an authority against the conduct of any landlord or builder who would strive to defeat his own grant, Holt, C. J., proceeded to mark the difference which would immediately arise, if the vendor had sold the vacant ground adjoining his house, without reserving the benefit of the lights in favour of the vendee of the house. If so, the other vendee might unquestionably build up against the lights; but where the lights were not parted with, as in *Palmer* v. *Fletcher*, there the vacant ground became

charged with the easement (1). The vendee of the vacant ground would have stood, in case of the extinguishment of the right by non-reservation, in the condition of a stranger; and it has long been held, that a stranger having land adjoining to a house newly erected, is warranted in stopping its lights, because, under those circumstances, a man may act as he thinks fit upon his own land (2).

We have thus shewn what may be considered as obstructions to lights, both in respect of the particular interruptions complained against, as of the houses which the law will protect in the enjoyment of that easement. It should, however, be remarked here, that one very important defence to actions for obstructions has not yet been mentioned, namely, the extinguishment of the privilege, arising from various causes. We have devoted a place for the separate consideration of this doctrine at the end of the treatise; and we now proceed, thirdly, to mention the chief remedies which may be employed, at law and in equity, for injuries of the description above adverted to. Before, how-

(1) 2 Ld. Raym. 1093, in *Tenant* v. *Goldwin*, by Holt, C. J.; S. P., 6 Mod. 114, in S. C.

(2) 1 Lev. 122.

ever, we enter upon this inquiry, it may be desirable to mention two cases, which do not seem to belong to any of the heads already discussed, and which are yet very relevant to the subject of obstruction. In the first of these the Building Act was relied upon as a defence: the mischief complained of was the wrongful erection, by the defendant, of a wall and building near to the window of the plaintiff's workshop, so that he had suffered material inconvenience in his trade of a coach-maker. The premises of the two parties adjoined, and, until 1803, had been divided by a wall of brick and mortar, standing wholly on the land of the plaintiff. The plaintiff had built a workshop for the purposes of his trade, thirty-four years before the action; and the full enjoyment of light was necessary to this building, the windows of which fronted the land of the defendant. The wall above mentioned, being, at length, condemned as ruinous by the district surveyor, was taken down, and a party wall, eighteen inches thick, was erected by the plaintiff, half on the land, and half at the expense of each proprietor. At the same time the plaintiff rebuilt his workshop; and it appeared, that the windows which were the subject of the

action looked out on the adjoining land, from the party wall in which they were inserted. While the old wall stood the defendant had used it by erecting a shed against it on his land, but which rose not any higher than the wall; now, however, he carried up an additional height of perpendicular wall, upon his half of the new party wall, and had built up his shed to the same height, thereby creating the obstruction complained of. It was objected, at the trial, that these windows of the plaintiff were a nuisance, being in the party wall, and, therefore, that an action was not maintainable; but the jury were directed to find for the plaintiff, the point being reserved; and the Court refused to disturb the verdict; for, although the defendant might possibly abate the plaintiff's building as a nuisance, and then have justified, if an action had been brought under the Building Act; or, again, although the magistrates might have ordered the building to be pulled down, upon an information laid by the district surveyor, the defendant, nevertheless, was by no means justified in obstructing the lights. The plaintiff was not charged with building an illegal wall, but the defendant was the party complained against, for interrupting

an easement; and it was the opinion of the Court that the title to the lights remained, notwithstanding the raising of the wall (1).

In the other case, the landlord of a house in Oxford Street, which he had divided into two tenements, was the plaintiff, and a person to whom the landlord had demised one tenement was the defendant. The plaintiff lived in the other; and the window which the defendant was charged with obstructing existed in the house at the time of the demise. It was understood and admitted, that this window was of recent construction. The defendant having obstructed it, an action was brought, and the defendant's counsel submitted, that it must fail for want of evidence that the easement was ancient. But Abbott, C. J., said, that the action was maintainable, although the window was new, and there was no stipulation against the obstruction when the tenement was leased; for the person in this case held as tenant, and the window was in existence at the commencement of his term (2). Here the defendant's

(1) 5 Taunt. 465, *Titterton* v. *Conyers;* 1 Marsh. 140.

(2) Ry. & Moo. 24, *Riviere* v. *Bower.*

character, as tenant, obviously rendered any attempt on his part to molest his landlord abortive; for there is a privity of contract between persons so situated as will create implied conditions, that neither shall do anything to the annoyance of the other, during the continuance of the relationship which subsists between them.

The defendant had raised a party fence wall, which divided the premises of the plaintiff and defendant, and had built up a workshop and a stable up to and upon the wall so raised, whereby the plaintiff's windows were darkened. The defendant's objection on the Building Act being overruled, it was left to the jury to say whether the plaintiff's enjoyment of light and air was diminished to a greater degree than it would have been had it been erected on the defendant's moiety of the wall only. The jury found in the negative, but they found that there had been such a diminution of light and air as made the plaintiff's premises less fit for occupation. Upon this the verdict was for the plaintiff, with liberty to move to enter a nonsuit. The Court said, that the case was not within the Building Act, and that an action on the case was the proper remedy, and the rule for a non-

suit was discharged (1). If the building, however, be on a party wall, half belonging to A. and half to B., trespass or case will lie (2).

REMEDIES FOR OBSTRUCTIONS.

The action upon the case is the most direct and usual form of action adopted for the redress of the grievance here treated of. It was customary to sue by an assise of nuisance in very ancient times (3), but this remedy gave way to the action on the case, and the use of the latter has continued without intermission to this day. But although no objection has been made to the nature of this proceeding, several points have been raised, from time to time, as to the particular relations in which the individual making use of it has stood. For example, it has been urged, upon different trials, that lessees and reversioners were not competent to sue for an injury of this sort. Thus, where the plaintiff was a lessee for years, it was moved to arrest the judgment, because the

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(1) *Wells* v. *Ody*, 7 C. & P. 410; 1 Mees. & W. 452.
(2) S. C.
(3) 7 E. 3, 50; 22 H. 6, 15; 1 Ro. Ab. 107, citing S. C. See Vin. Ab., Tit. Stopping Lights, D.

declaration had not alleged any person in whom the prescription might be fixed; for as to the plaintiff, he could not prescribe; but the Court answered that the prescription was tied to the house, and not to the person, and the matter was adjudged for the plaintiff (1). So where a reversioner, being the owner of the inheritance, sued his own lessee for stopping up windows in his house, it was moved to arrest the judgment, because the nuisance might, perhaps, be abated before the expiration of the term, and the suit, consequently, was precipitate. But the Court disallowed the objection (2); and this case was cited afterwards, by Aston, J., upon another occasion, where the plaintiff had counted first upon his possession, and then as reversioner, and there had been a verdict for him with general damages, and the Court held that *Thomlinson* v. *Brown* was decisive upon the question; for, according to Mr. Justice Aston's note of the case, it had been there held that an action might be brought by one in respect of his possession, and by the other in

(1) Cro. Car. 325, *Symonds* v. *Seaborne;* S. C., not S. P., Sir Wm. Jones, 326, *nom. Nerrers* v. *Seaborne.*

(2) Say. Rep. 215, *Thomlinson* v. *Brown.*

respect of his inheritance, for the injury done to the value of it (1). And again, Lord Tenterden held, that the heir of a surviving trustee was competent to sue for a damage to the reversion of a house in Wood Street, the lights of which had been stopped; for the nuisance complained of was an injury to the right (2). If the reversioner sues, it is sufficient for him to show an obstruction which may cause the injury; and a declaration is not bad upon demurrer, because it might be shown that the injury was merely temporary (3). But if a right be established against a leaseholder, the reversioner is bound.

It is not a breach of the covenant to repair and keep in repair, to have enlarged windows (4).

It may be further remarked here, that difficulties have occasionally arisen as to the persons against whom this action for disturbance of lights should be brought. But it has long been received as law, that if a lessor, having

(1) 4 Burr. 2141, *Jesser* v. *Gifford*; and see 3 Leo. 109, *Biddlesford* v. *Onslow*.

(2) Moo. & Malk. 350, *Shadwell* v. *Hutchinson*.

(3) As hoarding. *Metr. Assoc. &c.* v. *Petch*, 27 L. J., C. P., 33; 5 C. B. 504. *Shadwell* v. *Hutchinson*, Moo. & Malk. 350, was cited.

(4) *Doe* d. *Dalton* v. *Jones*, 1 Nev. & M. 6.

created a nuisance during his possession, demises the premises where the obstruction exists to another, the lessee continues liable, at the suit of the injured party, until the removal of the nuisance. Thus it appeared, that the defendant was lessee for years of a piece of ground adjoining to an ancient messuage, which latter had ancient lights, and that the defendant had erected a house to the interruption of these lights. The defendant then assigned his term over to another, and the plaintiff brought his action against the assignor, the original lessee, for a continuance of the nuisance; and the Court held, that the action lay against the defendant in this case, for he was liable before his assignment to all consequential damages, and he could not discharge himself by granting over the term; and they said, moreover, that if the nuisance were to continue after recovery for the erection of it, a new action would be maintainable for the continuance; and they held also, that the proceedings might be had either against the lessor or lessee in such a case (1). Holt, C. J., observed, in giving judg-

(1) 12 Mod. 635, *Roswell* v. *Prior;* 2 Salk. 460; 1 Ld. Raym. 713; S. P., Carth. 456, in *Johnson* v.

ment, that he was not satisfied with the case of *Rippon* v. *Bowles* (1), where the judges had inclined to hold that a lessee was not answerable for the continuance of a nuisance, inasmuch as it would be waste to abate it; for it is the lessee's fault to contract for an interest in land upon which there is a nuisance. Nevertheless there shall be but one satisfaction; and, consequently, if a plaintiff sue the lessor, he shall, after his damages have been ascertained, be barred for ever against the lessee (2). But here it will have been noticed by the reader, that no continuance of the nuisance was laid by the plaintiff; therefore, where a declaration averred such a continuance, it was held that a plea of judgment recovered for the same identical grievances was no answer to the action. For the obstruction of light, from November, 1828, till the commencement of the suit (which was the present mischief complained of), could

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Long. See also 1 Keb. 794, *Palmer* v. *Fleshier*, where a similar action was entertained.

(1) 1 Ro. Rep. 221; Cro. Jac. 373, cited *ante*, p. 9; and note, that the plaintiff having procured judgment to be entered, the defendant, notwithstanding the inclination of the Court, was put to his writ of error.

(2) 12 Mod. 640; S. P., Carth. 455, *Johnson* v. *Long*; 1 Salk. 10; 1 Ld. Raym. 370.

not be said to be the same with that which had been effected at an earlier date. A verdict having passed for the plaintiff, the Court refused a rule for a new trial (1).

If a person acts as manager of works by which light is obstructed, the action may, probably, lie against him alone. But if he be co-defendant with the contractor, his employer, he cannot urge in defence that the contractor only is liable, because he is himself manifestly the sole superintendent. Had the contractor given all the orders, the managing clerk might have been looked upon as a mere servant (2). Trespass was brought for pulling down a stable. The plea was, the possession of a dwelling-house adjoining the plaintiff's close, so as to confer a title to have the light and air enter through a certain ancient window therein; that the stable obstructed the light and air, and darkened the window. The replication was De Injuriâ. Special demurrer. This replication was held good. The plea consisted merely of excuse. It neither claimed any interest in the plaintiff's

(1) 4 C. & P. 333, *Shadwell* v. *Hutchinson;* 2 B. & Ad. 97.

(2) *Wilson* v. *Peto*, 6 Moore, 47. See *Stone* v. *Cartwright*, 6 T. R. 411.

land, nor set up such a right by virtue of any authority from the plaintiff, within the rule which precludes the adoption of a general replication. It only claimed a right on the part of the defendant to enjoy his own land in a given way (1).

The plaintiff declared in case, that he was seised of a court-yard, and that the defendants made new windows towards it, whereby his goods could not be kept safe, &c. Holt, C. J., said, that the plaintiff might fence his own yard. There was no obligation laid by prescription to inclose for him. He might build against these windows (2). Still, in a case of irreparable mischief, the Court will interfere (3).

Injunction.

Another course of proceeding is to apply to the Court of Chancery for an injunction to restrain the defendant from illegally building, so as to obstruct lights. This measure is of course pursued where the mischief is in pro-

(1) *Thompson* v. *Eastwood*, 8 Exch. 69.

(2) *Richardson* v. *Taylor*, Comb. 242.

(3) *Ryder* v. *Bentham*, 1 Ves. sen. 543; and see *Smith* v. *Elger*, 3 Jur. 690; *Att.-Gen.* v. *Doughty*, 2 Ves. sen. 453.

gress, and it lies entirely in the breast of the equity judge to refuse or grant the remedy prayed for. However, the Court will lend a favourable ear, in general, to applications of this sort (1), and will frequently direct an issue, in order that the real merits of the case may be determined, whilst the defendant becomes subject to a temporary inconvenience only. The Court will sometimes likewise direct a view, to ascertain whether the new buildings stand upon the old foundations (2). Upon another occasion the defendant was found to have made considerable progress in the erection of an obstruction to the plaintiff's lights, and yet it was resolved that an injunction should issue to compel him to cease building, until the bill should be fully answered, or other order be made (3).

So against the lessee of an ecclesiastical

(1) *Duke of Beaufort's case* cited, 2 Bro. Ch. Ca. 65. Especially when the encroachment appears to be evident. As where the plaintiff in a small degree obscured his own lights, upon which the defendant built so as seriously to diminish the light and air of the plaintiff. *Archdekne* v. *Kelk*, 2 Giff. 683 ; 5 Jur. (N. S.) 114.

(2) *Att.-Gen.* v. *Benthan*, 1 Dick. 277.

(3) 2 Russ. 121, *Back* v. *Stacey*.

corporation, till she should establish her right to the easement in an action, the building, if completed, being a nuisance (1). In the case of a tenant from year to year who filed a bill against adjoining tenants for obstruction, the landlord gave him notice to quit, and at the hearing eight months of the tenancy were unexpired. The Master of the Rolls granted the injunction. This law the lords justices did not deny; but as the inconvenience of pulling down buildings apparently exceeded any damage sustained by the plaintiff, they, in opposition to the opinion of Sir J. Romilly, refused the interlocutory injunction. The plaintiff might bring his action, and the defendants were to accept notice of trial for the next assizes. It is worthy of remark, that the defendants had full notice of the supposed mischief (2).

The Court of Exchequer granted an injunction under 17 & 18 Vict. c. 125, s. 82, though not as of course. It was to restrain several supposed wrongful acts respecting ancient lights. The injunction was to lie in the office till Michael-

(1) *Sutton* v. *Lord Montfort*, 4 Sim. 559. The plaintiff to bring an action; the defendant not to set up her coverture, nor any outstanding legal estate.

(2) *Jacomb* v. *Knight*, 32 L. J., Ch., 601; 9 Jur. (N. S.) 529.

mas Term (1), the defendants undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had previously, and to do the same to the satisfaction of a surveyor to be agreed on or nominated by one of the judges of this Court, the defendants to pay the costs of the rule and of the surveyor (2).

A case has lately occurred in which there was no question but that the lights of the plaintiff had been obstructed. And the Master of the Rolls made a decree, in effect, that the buildings newly erected should be reduced so as to restore the ancient user enjoyed by the plaintiff. But the Lord Chancellor introduced a new theory, and directed an inquiry as to the amount of damages which, he thought, could be estimated as a compensation for the injury. And this decree, differing from the opinion of the M. R., was made, although the defendants continued their works after notice from the plaintiff (3).

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(1) This was in Trinity.

(2) *Jessel* v. *Chaplin*, 2 Jur. (N. S.) 931.

(3) *Isenberg* v. *E. Ind. House Estate Co.*, 10 Jur. (N. S.) 221. This is a doubtful decision; for by it a person of sufficient means is enabled to overturn, by the side-

But in a case where there was a dispute between the plaintiff and the defendant as to the ownership of a wall upon which the defendant was raising an obstruction, the injunction was denied. The plaintiff was possessed of a messuage and ground adjoining, inclosed by a wall; and the defendant, having pulled down this wall, began to build against the plaintiff's lights, contending, at the same time, for the property of the wall and ground. An injunction being asked, Lord King said, that if he were to grant it, it would be to determine the right on motion; but he ordered that the defendant should receive a declaration in trespass or ejectment as soon as the plaintiff should think proper to tender it (1). Here it is observable, that the defendant not only denied the obstructing of the plaintiff's lights, but claimed also a part of

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wind of an equitable jurisdiction, the ancient rights of his neighbour, even after a due notice of dissent. It seems to be an invasion of a constitutional right; and a common lawyer must at once adhere to a right which, in this instance, equity has not in her proper province protected. It is the notice which creates the divergence during these events. See *Jacomb* v. *Knight*, 9 Jur. (N. S.) 529; 32 L. J., Ch., 601; and the just observations of "The Jurist," 10 Jur. pt. 2, p. 85.

(1) Fitzgib. 106, *Bateman* v. *Johnson*.

the plaintiff's possession, which fact distinguishes this case materially from that of *Back* v. *Stacey*, just cited above.

So where the legal right was doubtful, and nothing had occurred to render the interposition of the Court absolutely necessary before trial, the injunction was refused (1).

An injunction likewise was refused to restrain the building of a brick wall which was seventeen feet from the house of the plaintiff (2). However, when the obstruction is quite clear the Court will interfere, as if a house be rendered less comfortable by the obstruction (3).

There had been a building adjoining that of the plaintiff, with a wall alleged to have been of the height of twelve feet, and not interfering with his light. The defendant was about to pull down the ruins of this wall, and to rebuild the wall to the height of thirty feet, which, he said, had been the original height. The balance of evidence being in favour of the plaintiff, an injunction was granted; and as the defendant

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(1) *Winstanley* v. *Lee*, 2 Sw. 333.

(2) *Fishmongers' Company* v. *East India Company*, 1 Dick. 163. See *Morris* v. *Lessees of Lord Berkeley*, 2 Ves. sen. 453.

(3) *Johnson* v. *Wyatt*, 9 Jur. (N. S.) 1333.

at the hearing did not move to dissolve the injunction, it was made perpetual, without compelling the plaintiff to try his right at law (1).

So where the defendant looked on with apparent acquiescence whilst the plaintiff was altering his lights, and had the plans of the alteration submitted to him, after which he commenced an obstruction; the Court granted an injunction (2). But a delay of five weeks is not an acquiescence so as to hinder relief (3).

By a railway Act it was declared, that nothing should authorize the Company to injure any house built before November 30, 1835, without consent. By another clause compensation was awarded. The reversioner of a house brought an action against the Company for obstructing lights, and the defendants propounded their compensation clause. But it was held that the plaintiff was not bound to come in under that clause. The house was not

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(1) *Potts* v. *Levy*, 2 Drew, 272.

(2) *Cotching* v. *Bassett*, 9 Jur. (N. S.) 590; 32 L. J., Ch., 286. The observations of Lord Eldon in *Dann* v. *Spurrier* were cited, 7 Ves. 235.

(3) *Johnson* v. *Wyatt*, 9 Jur. (N. S.) 1333. There must be a strong case of acquiescence at the hearing to induce non-interference by the Court; S. C.

specified in the Company's schedule, and, therefore, they were liable (1).

A tenant from year to year may have an injunction against the erection of a wall which will obstruct his lights, the writ being limited to his period of tenancy (2). And as between landlord and tenant there is a contract both express and implied, that the ancient lights of the lessee shall be protected; so that a lessee whose lease has expired during the obstruction may, upon renewal, maintain his suit in Chancery (3).

A tenant made an agreement for a lease, and then filed a bill to restrain his lessor, but did not ask to have the agreement specifically maintained. Here an equitable, not a legal right was claimed, and an injunction was refused (4). The declaration complained of an obstruction of light. The equitable plea was, that the defendants pulled down an ancient wall, and built up a new one with the plaintiff's knowledge. The equitable replication was, that

(1) *Turner* v. *Sheffield and Rotheram*, R. C., 10 Mees. & W. 425; 3 Railw. Ca. 222.

(2) *Simper* v. *Foley*, 2 Johns. & H. 555.

(3) *Gale* v. *Abbot*, 8 Jur. (N. S.) 987.

(4) *Fox* v. *Purssell*, 3 Sm. & Giff. 242.

the plaintiff asserted, on the faith of false representations, that no grievance would ensue. Both these forms of pleading were held good, and judgment was given for the defendant on his plea, and for the plaintiff on his replication (1). So reversioners of premises, who were about to diminish the light of their lessee, were upon every ground restrained from the wrongful act of obstruction. In fact, the smallest obscuration of light would be an injury to the business of the plaintiff, a diamond merchant (2).

However, upon another occasion, where the building was thirty feet distant from a mansion, the terms imposed, upon refusing the immediate injunction, were, that the plaintiff should try his right at law, and that the defendant should undertake to abate if the verdict were unfavourable to him (3).

And it must be understood, that if judgment be given to pull down houses, or any part of a building which darkens light, such part only as

(1) *Davies* v. *Marshall*, 10 C. B. 697; 31 L. J., C. P., 61; 7 Jur. (N.S.) 720.

(2) *Hertz* v. *Union Bank of London*, 2 Giff. 686; 1 Jur. (N. S.) 127.

(3) *Smith* v. *Elger*, 3 Jur. 790.

creates the nuisance can be removed (1). Indeed, the Lord Chancellor said, upon motion, that he never knew an instance of judgment to abate upon that proceeding, and, rarely, after a decree (2). Still, abatement will be ordered if the nuisance be real (3). In those days, when such decrees were rare, disputes concerning light were likewise, by comparison, rare; and the rarity itself shows how unsound the judgment against a mandatory injunction must appear, by dissolving a substantial and irreparable injury into a doubtful money compensation (4).

But there is yet another remedy permitted by the law; and although it should be resorted to on emergent occasions only, and even then with great caution and moderation, circumstances may occur which would render its adoption as prudent as it certainly would be legitimate. This proceeding is by entering upon the land of the person building up against

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(1) *Shalmer* v. *Pulteney*, 1 Ld. Raym. 276; Id. 277, Powell, J.

(2) *Ryder* v. *Bentham*, 1 Ves. sen. 343.

(3) 2 Ves. sen. 453; by Lord Hardwicke.

(4) *Isenberg* v. *East India House Estate Company*, 10 Jur. (N.S.) 221.

the lights, and abating the erection as a nuisance; and the Courts have so strongly entertained the occasional propriety of thus removing the obstruction, that where the defendant had been convicted of a riot for pulling down part of a house which was a nuisance to his lights, and which had been so found by a jury in an action brought to try the right, a small fine only was set upon him; and it was said, that if one build a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's house and pull it down (1).

But it is not competent for a party to adopt this course, unless the thing in question be obviously a nuisance; and, therefore, upon the commencement of an erection which seems likely to prove an interruption, the only safe method is to apply for an injunction. Thus, in a case where it appeared that the plaintiff had set up several pieces of timber for the erection of a house, so as to threaten the lights of an adjoining messuage, he was successful in his action, notwithstanding that he had been

(1) *Rex* v. *Rosewell*, 2 Salk. 459.

apparently the aggressor; for one of the defendants, who was the owner of this neighbouring dwelling, and his servant, the other defendant, having by his order obstructed the plaintiff's workmen in the execution of their intended building, an action of trespass was brought for an assault, and the loss of the service of these workmen was laid as a gravamen. The defendant pleaded not guilty, and put the special matter upon the record, by way of justification, upon which the plaintiff demurred; and judgment was given for the plaintiff, not only because the plea was bad in some formal points, but on the merits, because it was impossible for the defendants to have known whether the building would have been a nuisance until its erection. The plaintiff might have forborne, and have left off his building, which, as far as it had proceeded as yet, presented no annoyance, and, as Lord Coke then observed, *Nemo tenetur divinare.* But as soon as the work had so far advanced as to have been plainly a nuisance, then the defendant might have entered and destroyed it (1). It is doubtful whether an

(1) *Norris* v. *Baker*, Bridgm. 47; 1 Ro. Rep. 393; 3 Bulstr. 196, *nom. Morrice* v. *Baker.*

injunction would be allowed to issue in this case, because it must appear to the satisfaction of the Court that the window of the applicant will necessarily suffer by the building complained of, before the Court will countenance a remedy so summary.

In order to obtain an injunction it must be made out that material injury, amounting to a nuisance, will occur. Affidavits that ancient lights will be darkened will not suffice. The diminution of the value of the premises is not a ground. An action on the case might often lie on facts that would not support an injunction (1).

Indictment.

It appears, according to a note in Lord Raymond, that, upon an indictment for a nuisance, Holt, C. J., had ruled, that the building of a house in a larger manner than before, so as to darken the street, was not a public nuisance (2). The defendant must, of course, have been acquitted.

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(1) *Att.-Gen.* v. *Nichols*, 16 Ves. 338.

(2) *Rex* v. *Webb*, 1 Ld. Raym. 737; *Arnold* v. *Jefferson*, Holt, J., Ca. 498. This opinion was confirmed by V. C. Kindersley, 21 L. J., Ch., 159.

CHAPTER IV.

Extinguishment of the Right to Light.

The last point to which we have to direct the attention of the reader is that of extinguishment. There is more than one event which will determine or extinguish this easement of light; and circumstances have occurred, on the other hand, under which it has been strongly insisted that the right was annihilated, whereas the Courts have held that the particular act done worked no alteration of the privilege. It will, therefore, be desirable to inquire what shall be said to occasion this destruction of ancient or other lights, and what not.

Unity of Possession.

And first, unity of possession, which is fatal to the continuance of so many incorporeal hereditaments, as ways, commons, &c., has always been held to abate the privilege of lights also. Thus, a writ of *quod permittat* was brought against the defendant, *prosternere quandam domum, &c.*, and it appeared that the plaintiff

had been possessed of an ancient window, and that the defendant had erected a house upon his own freehold, so near that of the plaintiff that it overhung the same, and stopped the light. The defendant pleaded a former unity of possession of both the houses in one R. A.; and that, because his own house had become ruinous, he pulled it down, and built another in its room. Issue being taken, and a verdict found for the plaintiff, it was moved to arrest the judgment, inasmuch as no greater part of the new house ought to be abated than that which overhung the plaintiff's house beyond the former building; and this rule, the Court admitted, would have holden, provided it had been properly pleaded. For although, before the unity of possession, one of these houses might have wrongfully overlooked the other, yet the tort was purged as soon as they ceased to be in different hands; therefore, neither party could in justice complain of an antecedent wrong, and consequently, but for the increase of the new house, there would not have been any cause of action; and, notwithstanding that judgment was given for the plaintiff upon the record as it stood, the Court stayed the execution until the part overhanging *de novo*

might be viewed, it appearing to have been a vexatious proceeding on the plaintiff's part (1). And it was further said, that if one have an ancient house and lights, and purchase the next house or ground, his privilege against the newly purchased land ceases; and, therefore, it was added, that if the former house were let, the lessor might build upon the land adjoining, and if the latter, that the lessee might build in like manner (2). But these latter positions are not in accordance with the law now received, nor with cases adjudged in former times; for, as to the first, it is clear that a man cannot derogate from his own grant, nor seek to stop up lights which he has demised to another (3); and, as to the second, it would be contrary to the implied contract between landlord and tenant, that such an interruption should take place by any such act on the part of the latter (4).

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(1) *Robins* v. *Barnes*, Hob. 131; Mo. 666; where it was said that the vendee should never abate the nuisance.

(2) Hob. 131.

(3) Unless, indeed, the landlord had made no reservation of the lights. See *ante*, p. 60, where the authorities are collected.

(4) See *ante*, p. 81. *Riviere* v. *Bower*, Ry. & Moo. 24.

This doctrine of extinguishment by unity continues, notwithstanding the statute 2 & 3 W. 4, c. 71, which, by section 3, confers the benefit of light absolutely after twenty years' uninterrupted use. Case was brought, since that Act, for obstruction. The pleas were, "Not guilty," and a traverse of the right. It appeared in evidence that the plaintiff and his father had occupied an ancient house in fee, as well as a garden, for sixty years, and during that time enjoyed the use of light. At length the garden fell into the hands of the defendant. In 1846 he built a wall in the garden, and caused the obstruction. It also appeared that the plaintiff and his father had occupied the garden under three successive landlords, as tenants from year to year. It was objected, that in this case there had been a unity, and a nonsuit was directed, which the Court sustained. By Parke, B: "It converts into a "right such an enjoyment of the access of light "over contiguous land, as has been had for the "whole period of twenty years, in the character "of an easement distinct from the enjoyment of "the land itself. And the statute puts this "species of negative easement, as it has been "termed, upon the same footing in this respect as

" those positive easements provided for as ease-
" ments in the other sections, all of which, after
" long enjoyment, are invested with the quality
" of rights" (1).

However, as soon as the unity ceases, the right survives as to the particular easement. If the dominant and the servient tenements be united for different estates, as soon as the ownership becomes severed the easement revives (2).

Non-User.

Another cause, which operates to destroy the easement of which we are treating, is the non-user of it, either by shutting up the windows through which the light has been derived, or by any other act which manifests a design to abandon the enjoyment of it for the future. And we shall find that, in order to effect this destruction of the privilege, it is not necessary that the user should have been forborne for twenty years, as in the cases of commons and ways.

In the action, however, to which we are about to refer, it appeared that the window had

(1) *Harbridge* v. *Warwick*, 18 L. J., Ex., 245; 3 Ex. 552.

(2) *Simper* v. *Foley*, 2 John. & H. 555.

been actually shut up for that period. The plaintiff sued the defendant for erecting a privy in his house, which was a nuisance to that of the plaintiff. When first built, it was not an inconvenience; but the plaintiff subsequently opened a window in the wall of her house, immediately over it, and then it was that the former easement became obnoxious. There was the mark of an old window in the place where this window had been struck out, but it had been filled up with brick and mortar above twenty years before the erection of the privy. Lord Ellenborough directed a nonsuit, observing that, as to the window, the case was the same as though it had never been erected, and that the plaintiff had, consequently, brought the nuisance upon herself by opening the window (1).

The doctrine of extinguishment, however, concerning light, was most fully considered in a more modern case, which was decided by the Court of King's Bench, after due and careful examination. An action on the case had been brought for obstructing lights, and it appeared that the plaintiff and defendant were owners

(1) *Lawrence* v. *Obee*, 3 Campb. 514.

of messuages adjoining to each other; that of the plaintiff was an ancient house, and close to it there had been a building, formerly used as a weaver's shop, and to which the privilege of ancient lights appertained. About seventeen years before the action, the then owner and occupier of the premises took down the old shop, and erected a stable on its site, having a blank wall adjoining the premises of the present defendant. It had been latterly used as a wheelwright's shop. About three years since, the defendant erected a building next to the blank wall, and the plaintiff then opened a window in that wall, in the same place where there had formerly been a window in the old wall, and it was for the obstruction of this light that the dispute arose. Mr. Baron Hullock having directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit, a rule *nisi* was obtained, and the Court were unanimously of opinion that it should be made absolute; for the former possessor of the shop had apparently abandoned the window which gave light and air to his house, and unless he had manifested some intention to resume the enjoyment of them (which the plaintiff was bound to have

proved), the Court could not do otherwise than consider that the right had been perpetually relinquished: indeed, by building the blank wall, the then owner might have induced another person to become the purchaser of the adjoining ground for building purposes, and he could not be allowed to frustrate those purposes by pretending to revive an easement which he had shown no intention of retaining (1). It having been contended by counsel in this case, that the non-user ought to have continued for twenty years, in order to warrant a release or extinguishment of the plaintiff's right, Littledale, J., said, that it would be most inconvenient to hold that doctrine, for it was not like the case of a common or a way, where a grant of the easement is presumed, after twenty years' enjoyment, to have taken place before the user commenced. Upon another occasion, Martin, B., left these points to the jury: whether the lights were closed so as to lead the other party into a belief that they had been abandoned, and so causing him expense; whether an intention of manifestly and permanently giving up the lights appeared. The

(1) *Moore* v. *Rawson*, 3 B. & C. 332.

plaintiff had blocked up his windows (1), and the defendant bought the tenement which they overlooked, and built up the premises, upon which the plaintiff reopened the apertures for light and obtained a verdict. The Court approved of the direction of the judge, and discharged the rule for a new trial (2). The enjoyment of light requires not any consent from the owner of the adjoining land. It arises by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. The source of it is mere user, and it may, therefore, be lost simply by non-user (3).

The plaintiff enlarged his house, and so altered the position of his ancient windows. The defendant, within twenty years, obstructed these windows, and the Court held, that he was justified in traversing the plaintiff's right without pleading more specially. The verdict was entered for the plaintiff, on not guilty,

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(1) He filled them up for the purpose of warehousing tea.

(2) *Stokoe* v. *Singer*, 8 El. & Bl. 81; 3 Jur. (N. S.) 1256; 26 L. J., Q. B., 257.

(3) 3 B. & C. 339—341; 2 Bl. Com. 14.

and for the defendant on the plea denying the right (1).

"Questions may arise," says Professor Amos, in one of his lectures, "under the new Act, "whether a right of common, way, and especially "of light, can be lost by flux of time alone, in "less periods than sixty, forty, or twenty years "respectively. And whether they can be lost "in less time than these periods by any act in- "dicating an abandonment short of a release, "under seal. And whether instruments of "abandonment may not be presumed; and if "so, within what, if any, stated periods? The "subject of abandonment of rights has been "very little considered in our jurisprudence."

What not an Extinguishment.

But, as we have already seen in several cases (2), the mere alteration of the window entitled to the privilege will not be followed by the extinction of it. Nor can the opening of a new window extinguish or even suspend

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(1) *Renshaw* v. *Bean*, 21 L. J., C. B., 219; 18 C. B. 112; 16 Jur. 814; cited with approbation by Pollock, C B., 26 L. J., Ex., 36.

(2) *Ante*, p. 62.

the ancient right, whatever the legal consequence as to obstructing it may be (1). To be sure, the excess of the easement beyond its ancient form may be interrupted and built up against, but the undue enlargement occasions no detraction from the original right. This matter is so clear that we need not do more than refer to *Luttrel's* case, where it was said, that if one have an old window to his hall, and he convert the hall into a parlour, or to any other use, yet his neighbour will not be warranted in stopping the light, for the prescription survives the alteration (2).

Building Act.

It has been held, that the provisions of the Building Act, 14 G. 3, c. 78, concerning lateral windows, have not destroyed the ancient rights attached to those windows. And it will be recollected (3), that a defence of this nature, to an action for the obstruction of lights, proved unsuccessful (4); for, however liable a party

(1) *Binkes* v. *Pash.* 11 C. B. 324; 8 Jur. (N. S.) 360; 31 L. J., C. P., 121.

(2) 4 Rep. 87.

(3) See p. 81, *ante.*

(4) *Titterton* v. *Conyers*, 5 Taunt. 465; 1 Marsh. 140.

might be to the interference of the surveyor, supposing that the windows were in existence contrary to the provisions of the Act, or to the interruption of the defendant himself, if he had proceeded according to the directions of the statute, it was impossible that the justification relied upon could be available as the defendant had used it.

Parol License when not countermandable.

A case occurred, some years since, in which the Court held, that a parol license to put out a window could not be recalled at the pleasure of the person making it; and we will, therefore, notice it here, in the last place, as being nearly allied to the doctrine of extinguishment. An action was brought for a nuisance for wrongfully placing a skylight over the area above the plaintiff's window, so that the light and air were excluded from the house of the plaintiff, and various noisome smells introduced. It appeared, however, at the trial, that the skylight had been erected with the express consent and approbation of the plaintiff; while the plaintiff, on his part, insisted, that after it had been finished, he had objected to it, and had

given notice that it should be removed. But Lord Ellenborough held, that this license having been acted upon, and expense incurred, could not be recalled, without, at least, putting the defendant in the same situation as before, by offering to reimburse him all his expenses; and the defendant had a verdict, which the Court afterwards refused to disturb (1).

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(1) 8 East, 308, *Winter* v. *Brockwell*. Lord Ellenborough said, on the motion for a new trial, that the rule was, that a license granted was not countermandable, but only when it is executory. Here it had been executed. To the same effect is *Davies* v. *Marshall*, 10 C. B.. 697; 7 Jur. (N. S.) 720; 31 L. J., C. P., 61.

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All the more important decisions upon the construction of the Acts and Rules down to the end of the Michaelmas Sittings, 1877, will, I believe, be found noticed with some of later date.

Many minor typographical changes have been made in this edition, which will, I hope, be found to increase its convenience in use. Italic type has been used throughout the book to indicate repealed matter.

All the Rules of Court, both those in the Schedule and those of later date, have been issued without marginal notes. I have ventured to add short marginal notes to them.

I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Roll's Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annnexed to the rules, and in many other ways.

I wish particularly to notice the Table of Cases, which Mr. Biddle has prepared. The course ordinarily adopted throughout the book is to cite each case with a reference to only one report of it, except where there appeared special reason for referring to another. The Law Reports are commonly cited where the case has appeared in that series. To have mentioned in the body of the work every report of each case would have been a cumbrous and I think an inconvenient plan. On the other hand, many practitioners use series of reports other than those commonly cited in this Book. To meet the difficulty thus arising, the Table of Cases gives a reference to all the reports of each case cited.

The reconstruction of the Index, rendered necessary by the large amount of new matter, has been kindly undertaken by my learned friend, Mr. Harry Greenwood, of the Chancery Bar.

The Introduction which appeared in the former edition has been omitted in this. That Introduction was intended to assist the reader to become acquainted with a system then wholly new. The system is no longer new or unknown, so that there is not the same necessity for such an introduction. The omission contributes to secure an object which I have throughout had in view, the keeping down the bulk of the book.

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